(1)

Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ALAN RICHARDS, ET AL.,
JOHN R. NORTON, III, ET AL.,

Petitioners,

v.

LLOYD'S OF LONDON,
AN UNINCORPORATED ASSOCIATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether courts may create a judge-made exception to the unambiguous anti-waiver provisions of the federal securities statutes in order to enforce contractual forum-selection and choice-of-foreign-law clauses that, in tandem, operate to waive compliance with the federal securities laws by foreign enterprises in connection with their offer and sale of securities in the United States?

2. Whether, quite apart from the securities anti-waiver statutes, public policy permits a foreign party to enforce contractual forum-selection and choice-of-law clauses that prospectively waive the statutory remedies of United States residents for federal securities law and RICO violations committed by the foreign party in the United States?

3. Whether a district court may enforce contractual forum-selection and choice-of-law clauses that a defendant inserted in the contract for the purpose of insulating itself from claims under United States law for its fraud in obtaining millions of dollars of plaintiffs' investment capital?

LISTING OF PARTIES

I. Parties on Petition for Certiorari

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G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 U.C.L.A. L. Rev. 623 (1988) 15

Chief Justice Fred M. VINSON, *Work of the Federal Courts*, Address Before the American Bar Association (September 7, 1949) *in* 69 S. Ct. v 13

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming dismissal of these actions based on contractual forum-selection clauses that, in tandem with choice-of-law clauses, waive Petitioners' remedies under the federal securities laws and RICO.

OPINIONS AND ORDERS ENTERED BELOW

The Ninth Circuit's 8-3 en banc opinion (App. A, 1a-23a) is reported at 135 F.3d 1289. The order staying the appellate mandate (App. B, 24a-25a) is unreported. The Ninth Circuit's divided panel opinion (App. C, 26a-53a), withdrawn by the en banc court, is reported at 107 F.3d 1422.

The district court's decision in *Richards v. Lloyd's of London* (App. D, 54a-75a) is reported at [1995] Fed. Sec. L. Rep. (CCH) ¶ 98,801; [1995] RICO Bus. Disp. Guide ¶ 8839. That court's post-judgment order in *Richards* (App. E, 76a-83a) and its order in *Norton v. Lloyd's of London* (App. F, 84a-86a) are unreported.

STATUTORY PROVISIONS INVOLVED

Section 14 of the Securities Act of 1933 (the "1933 Act") provides:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

15 U.S.C. § 77n. Section 29(a) of the Securities Exchange Act of 1934 (the "1934 Act") provides:

> Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

15 U.S.C. § 78cc(a).

Sections 5, 7(a), and 12(a) of the 1933 Act are reproduced in Appendix G, 87a-90a. Section 10(b) of the 1934 Act and Rule 10b-5 thereunder are reproduced in Appendix H, 91a-92a. Section 15 of the 1933 Act and § 20(a) of the 1934 Act are reproduced in Appendix I, 93a. Section 2(1), (7) of the 1933 Act and Section 3(a)(10), (17) of the 1934 Act are reproduced in Appendix J, 94a-96a. The civil remedies section of RICO,[1] 18 U.S.C. § 1964(c), is reproduced in Appendix K, 97a.

JURISDICTION

The en banc judgment of the United States Court of Appeals for the Ninth Circuit, affirming the district court's dismissal of this case, was entered February 3, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

These consolidated cases come to the Court on an undisputed evidentiary record. Petitioners are individual residents of the United States who were solicited — in the United States — to buy passive membership interests in Lloyd's of London, an insurance enterprise based in England.[2] Upon becoming members, Petitioners (called "Names" by Lloyd's) were further solicited in the United States to invest in insurance syndicates run by Lloyd's "Managing Agents," placing at risk Petitioners' entire net worth to back any syndicate losses.

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[1] The Racketeer Influenced and Corrupt Organizations chapter of the Organized Crime Control Act of 1970 ("RICO").

[2] Petitioners sued two defendants: the Corporation of Lloyd's, also known variously as the Society of Lloyd's and as the Society and Council of Lloyd's (the "Society"); and Lloyd's of London, an unincorporated association consisting of the Lloyd's entities that manage the Lloyd's insurance enterprise (the "Unincorporated Association"). Together these defendants are referred to herein as "Lloyd's."

Lloyd's did not tell the Names that Lloyd's recruited them in a fraudulent scheme to shift billions of dollars of expected syndicate losses from Lloyd's "insiders" to outside investors like Petitioners. When those losses became imminent in 1986, Lloyd's induced Names to sign "General Undertaking" agreements containing forum-selection and choice-of-law clauses ("Choice Clauses"). *See* App. A, 3a-4a. Those clauses require Petitioners to sue only in English courts, which would not enforce any of Petitioners' rights under United States law.

I. Lloyd's Fraudulent Offers and Sales of Securities In the United States

Lloyd's solicited Petitioners in the United States to join Lloyd's and its syndicates.[3] *See* App. A, 8a. "Members' Agents" within Lloyd's, acting at the direction and control of the Society, hosted sales presentations and organized face-to-face meetings in the homes and offices of potential Names — all in the United States. Members' Agents paid commissions and referral fees to United States securities brokerage firms and hired other recruiters in the United States to solicit new Names. Members' Agents also annually travelled throughout the United States encouraging Names to increase their underwriting in syndicates. In short, "Lloyd's purposefully devoted considerable time and resources to recruiting American investors through specifically American media." En banc dissent, App. A, 18a. Lloyd's disputed none of those facts.

Petitioners alleged, and the undisputed evidence showed, that their participations in Lloyd's constitute the purchase of "investment contract" "securities" within the meaning of the securities laws.[4] Petitioners invested capital in the Lloyd's

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[3] *See* evidence cited in Plaintiffs'/Appellants' Opening Brief ("Names' Br.") 10 and Plaintiffs'/Appellants' Reply Brief ("Names' Reply Br.") 15, 23.

[4] Section 2(1) of the 1933 Act defines the term "security" to include "any . . . investment contract. . . ." 15 U.S.C. § 77b(1). Section 3(a)(10) of the 1934 Act contains the same definition. 15 U.S.C. § 78c(a)(10). *See, e.g., United Hous.*

(footnote continues)

enterprise by posting letters of credit and other assets upon joining Lloyd's. Lloyd's assessed levies upon Petitioners for a Central Fund administered by Lloyd's to cover the losses of any Name that failed to satisfy his or her syndicate obligations. Petitioners also invested in the Lloyd's syndicates by pledging to pay any syndicate losses. Lloyd's Managing Agents managed every aspect of the syndicates' business; Lloyd's prohibited Names from participating in the operation of the syndicates.[5] Lloyd's did not challenge the Petitioners' securities allegations and evidentiary showing in the district court; on appeal, Lloyd's conceded that the "security" issue was not before the court;[6] and the en banc majority "assume[d] without deciding" that Petitioners in fact did invest in "securities." App. A, 7a n.2.

Uncontroverted evidence also shows that Lloyd's committed fraud in connection with the offering and sale of its securities in the United States. Lloyd's knowingly failed to disclose to Petitioners that Lloyd's syndicates had reinsured billions of dollars of risks — especially risks of liability for asbestos injury and pollution clean-up — under occurrence-basis liability policies with no aggregate coverage limits.[7] Nevertheless, Lloyd's induced Petitioners to invest in those syndicates, and Petitioners suffered huge losses. The district court acknowledged that "numerous documents" show Lloyd's had advance knowledge of — but did not disclose to Petitioners — the "massive liabilities" that Petitioners faced before Lloyd's required Names to sign the Choice Clauses. App. D, 68a n.20.

II. The Forum-Selection and Choice-of-Law Clauses

In 1986, when Lloyd's had reason to fear that its syndicates would soon have to disclose very substantial losses — thereby

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(footnote continued)

Found. v. Forman, 421 U.S. 837, 851-52 (1975); *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299-301 (1946).

[5] *See* evidence cited in Names' Br. 9.

[6] *See* Appellees' Answering Brief 5 n.5.

[7] *See* evidence cited in Names' Br. 5-6, 11-13.

exposing Lloyd's fraud — Lloyd's required Names to execute General Undertakings containing the Choice Clauses. The Society imposed that requirement as a condition of any new participation in Lloyd's syndicates by existing Names, and as a condition of membership for all new Names. The Choice Clauses purport to require Names to sue only in English courts under English law. Petitioners executed those General Undertakings in the United States.[8]

The effect of the Choice Clauses, if enforced, is certain: in English courts, Petitioners cannot assert any claim under the federal securities statutes, RICO or other United States law — even claims that arose before Lloyd's required the Choice Clauses.[9] Moreover, unlike United States courts — which impose liability for intentional and negligent non-disclosure of material facts — English courts will not hold Lloyd's liable for knowingly failing to disclose material facts, on the rationale that Lloyd's owed Names no legal "duty" to speak. *See Ashmore v. Corporation of Lloyd's* [1992] 2 Lloyd's Rep. 620.[10]

III. Proceedings Below

Petitioners filed two separate suits (*Richards* and *Norton*) in the district court for the Southern District of California. Petitioners demonstrated that Lloyd's violated 1933 Act §§ 5, 7(a) by selling its securities without either (a) registering the offerings and making detailed financial disclosure, or (b) complying with an applicable exemption from registration. Petitioners also showed that Lloyd's violated the anti-fraud provisions contained in § 12(a)(2) of the 1933 Act, § 10(b) of the 1934 Act and SEC Rule 10b-5, and state Blue Sky securities laws.[11]

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[8] *See* evidence cited in Names' Br. 10, 14 and Names' Reply Br. 7.

[9] *See* SEC Br., App. L, 104a.

[10] *See also* expert legal opinions cited in Names' Reply Br. 30-31.

[11] *See* evidence cited in Names' Br. 22 and Names' Reply Br. 31–32.

In addition, Petitioners alleged that the Society's pattern of securities violations in connection with its control of the Unincorporated Association violated RICO. Petitioners also alleged that Lloyd's committed common law fraud and breach of fiduciary duty. Lloyd's never challenged the RICO and fraud allegations; Lloyd's also concedes that Members' Agents owed Names a fiduciary duty of disclosure.[12]

Without answering the complaints, Lloyd's moved to dismiss in reliance on the Choice Clauses. The district court granted the motion, despite Petitioners' unrebutted evidence in opposition to the motion. App. D, 60a-74a; App. E, 79a–83a. Petitioners, supported by the Securities and Exchange Commission ("SEC") as *amicus curiae*, appealed. App. L, 98a.

A divided three-judge Ninth Circuit panel reversed the district court's dismissal of Petitioner's federal securities and RICO claims. App. C, 26a (Noonan, J., with Wiggins, J.). The majority first concluded that the unambiguous federal securities anti-waiver provisions, 1933 Act § 14 and 1934 Act § 29(a), render the Choice Clauses void as to the federal securities claims.

> The Choice Clauses operate to effect such waivers. Accordingly, under the precise terms of these two statutes, the Choice Clauses are void.

Id. 33a. The panel further held that, quite apart from the anti-waiver statutes, the Choice Clauses are "unreasonable" in their impact on Lloyd's securities law obligations, and hence are unenforceable under the standards of *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).[13] App C, 40a-41a.

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[12] The district court had subject matter jurisdiction over Petitioners' federal law claims under 1933 Act § 22(a) and 1934 Act § 27, 15 U.S.C. §§ 77v(a), 78aa; RICO, 18 U.S.C. § 1964(c); and 28 U.S.C. § 1331. The court had jurisdiction over the state law claims under 28 U.S.C. §§ 1332(a), 1367(a).

[13] *Bremen* held that admiralty courts must not enforce private forum-selection agreements that are "'unreasonable' under the circumstances," 407 U.S. at 10,

(footnote continues)

The panel majority also reversed the dismissal of Petitioners' RICO claims. It remanded those claims to the district court with instructions to determine whether the Choice Clauses are "reasonable" in their impact on Lloyd's obligations under RICO. App. C, 41a.

The panel unanimously rejected Petitioners' assertion that Lloyd's fraud renders the Choice Clauses unenforceable. App. C, 32a. In so holding, the panel deferred to a purported "factual finding" by the district court that Petitioners' unrebutted evidence was not "sufficient" to demonstrate fraud in the procurement of the Choice Clauses. *Id.*[14]

On rehearing, the en banc Ninth Circuit acknowledged that the anti-waiver statutes "are worded broadly enough to reach this case", but nevertheless withdrew the panel opinion and affirmed the district court ruling, by 8-3 vote. App. A, 6a (Goodwin, J.).[15] Relying on *Bremen* and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the court held that forum-selection and choice-of-law clauses in private "international" agreements between United States residents and foreign companies override the congressional mandate unambiguously set forth in the anti-waiver statutes. The majority deemed Lloyd's securities offerings "international" in character — and thus exempt from the anti-waiver statutes under the majority's reading of *Scherk* — because the Names travelled to England for an otherwise

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(footnote continued)

such as when "enforcement would contravene a strong public policy of the forum in which suit is brought," or when the clause is "invalid for such reasons as fraud or overreaching," *id.* at 15.

[14] The district court's ruling that Petitioners' evidence was "not sufficient" (App. D, 69a) was—like any ruling on sufficiency of evidence—a conclusion of law.

[15] Judge Goodwin, who dissented from the initial panel decision, *see* App. C, 43a-53a, authored the en banc majority opinion. Judges Noonan and Wiggins, the original panel majority, were not selected in the random draw to participate in the Ninth Circuit's limited en banc rehearing. *See* Ninth Cir. R. 35-3.

trivial meeting as a condition of joining Lloyd's.[16] The majority speculated that "Lloyd's likely requires this precisely so that those who choose to be the Names understand that English law governs the transaction." App. A, 8a. The court concluded that, even though the Choice Clauses operate to waive Petitioners' rights and remedies under the United States securities laws, enforcement of those clauses was reasonable. This is so, said the court, because the remedies available to Petitioners in English courts are "sufficient" substitutes for the remedies and protections of the 1933 and 1934 Acts. App. A, 9a.[17]

The majority enforced the Choice Clauses under *Bremen* despite the holding in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988), that *Bremen* does not control when a statute "itself controls [defendant's] request to give effect to the parties' contractual choice of venue." *See* App. A, 7a n.3. Even though such statutes (the anti-waiver provisions) apply here, the majority declined to follow the reasoning of *Stewart*. According to the court, *Stewart* is inapplicable because *Stewart* "involved a federal court sitting in diversity confronted with a purely domestic transaction," *id.*, rather than the type of international transaction involved here.

Having concluded that *Bremen*, rather than *Stewart*, governed its decision, the Ninth Circuit confronted the statement in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), that

> in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for

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[16] *See Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1357 (2d Cir.) ("a brief meeting in London—a mandatory formality"), *cert. denied*, 510 U.S. 945 (1993).

[17] Likewise, the court held that "the loss of RICO claims does not suffice to bar dismissal" on the basis of the Choice Clauses. Enforcing the Choice Clauses is reasonable, the court believed, because the loss of RICO remedies would not have precluded dismissal under the doctrine of forum non conveniens (a theory the district court did not address). App. A, 13a.

> antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

Id. at 637 n.19. The majority said "[w]ithout question this case would be easier to decide if this footnote in *Mitsubishi* had not been inserted." App. A, 11a. Nevertheless, the court declined to apply *Mitsubishi* to Petitioners' securities claims, saying that *Mitsubishi's* language was "dictum" that did "not... outweigh[ ]" the Court's discussion and purported holding in *Scherk*, 417 U.S. at 516, 517 n.11, 519 n.13. The Ninth Circuit also stated that *Mitsubishi's* rationale was limited to the context of antitrust claims. *See* App. A, 11a-12a.[18]

Finally, the en banc majority rejected Petitioners' assertion that Lloyd's fraud renders the Choice Clauses unenforceable. Even though Petitioners alleged — and showed — that "Lloyd's knew that the Names were effectively sacrificing valid claims under U.S. law by signing the choice clauses," *see* App. A, 14a, Lloyd's fraud did not vitiate the Choice Clauses because, in the majority's view, Petitioners' fraud claims "go[ ] only to the contract as a whole, with no allegations [of fraud] as to the inclusion of the choice clauses themselves." App. A, 14a. In so holding, the Ninth Circuit acknowledged the Court's statement in *Moseley v. Electronic & Missile Facilities*, 374 U.S. 167 (1963), that "the issue of fraud should first be adjudicated [by the federal district court] before the rights of the parties under [contracts] can be determined." *Id.* at 171, *quoted* in App. A, 14a–15a. "[T]his statement", the Ninth Circuit agreed, "would seem to support the Names' position." App. A, 15a. Nevertheless, the Ninth Circuit said that, when viewed in procedural "context," *Moseley* did not apply to Petitioners'

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[18] The Ninth Circuit recognized that the Court quoted the *Mitsubishi* rationale with approval in a non-antitrust case. App. A, 12a n.5 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995)). The Ninth Circuit distinguished *Vimar* on the ground that that case involved liabilities under the Carriage of Goods by Sea Act ("COGSA"), "a statute designed to address international transactions" (App. A, 12a n.5), rather than the federal securities statutes.

fraud assertion because Lloyd's seeks to enforce the Choice Clauses *in this case*, whereas the defendant in *Moseley* sought to enforce the arbitration clause in a *separate* action. App. A, 14a-15a.

The three dissenting en banc judges, agreeing with the two judges in the Ninth Circuit panel majority, would have ruled the Choice Clauses unenforceable for two separate reasons. First, the anti-waiver statutes' plain language permits no international exception. App. A, 15a-19a (Thomas, J., dissenting). "The majority espouses a reasonable foreign policy, but one which emanates from the wrong branch of government." *Id.* 15a. Second, quite apart from the anti-waiver statutes, the Choice Clauses are unenforceable under the standards of *Bremen, Mitsubishi,* and *Vimar*. "Not only do the choice clauses preclude the plaintiffs from seeking the substantive remedies the Acts offer, but the protections they provide under English law are markedly inferior to the Acts'." *Id.* 20a. The dissent did not discuss whether fraud precludes enforcement of the Choice Clauses.

Recognizing that the five Ninth Circuit judges who voted to reverse the dismissal raised substantial grounds for disagreement, Judge Goodwin stayed the appellate mandate pending the Court's ruling on this petition. App. B, 24a-25a. *See* Fed. R. App. P. 41(b).

REASONS FOR GRANTING THE WRIT

I. The Court Has Not Settled the Questions Presented, and Should Address Those Questions Now

A. The Court's Precedent Leaves Critical Issues Unresolved

The Ninth Circuit's decision presents three integrally related issues that prior decisions of the Court have anticipated but not decided.

First, the Court has said — but never held — that the anti-waiver statutes preclude enforcement of forum clauses that, like the Choice Clauses here, effectively waive the substantive rights and remedies guaranteed by the federal securities laws. *See Shearson/American Express v. McMahon*, 482 U.S. 220, 229-32 (1987); *see also Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 482-83 (1989) (enforcing clause that preserved substantive securities rights); *Scherk*, 417 U.S. at 519 n.13 (same). Nevertheless, the en banc Ninth Circuit interpreted the Court's 5-4 decision in *Scherk* — which enforced a clause that *did not* effect such a waiver — as permitting enforcement of clauses that *do* effect waivers. App. A, 7a-8a. Significantly, the SEC strongly disagrees with that view. App. L, 105a-108a. The Chairman of the House Committee on the Judiciary also disagrees with that view:

> When foreign promoters come into Illinois and other States to raise capital, they cannot effectuate waivers of substantive rights under the securities laws.... Congress has said no and that should be the end of the story.

United States Investors in Lloyd's of London Deserve Their Day in United States Court, 143 CONG. REC. E1607, E1608 (daily ed. Aug. 1, 1997) (Remarks of Rep. Hyde) (approving the panel decision of Judges Noonan and Wiggins in this case).

Courts have no business applying *Bremen* in place of a clear statute. *See Stewart*, 487 U.S. at 29, and discussion *infra*, II. The Court should accept this opportunity to rule directly on the applicability and effect of the securities law anti-waiver provisions, and to complete the line of analysis commenced in *Scherk* and last visited nearly a decade ago in *Rodriguez*.

Second, the Court has said — but never held — that a court should not enforce forum-selection clauses when they operate in tandem with choice-of-law clauses to waive federal statutory remedies in non-securities cases. *See Mitsubishi*, 473 U.S. at 637 n.19 (Clayton Antitrust Act); *Vimar*, 515 U.S. at 540-41 (COGSA); *id.* at 541-42 (O'CONNOR, J., concurring in the judgment); *id.* at 548 n.8 (STEVENS, J., dissenting). The SEC believes that these statements absolutely preclude enforcement of choice clauses that, in tandem, waive the remedies and protections of the federal securities statutes. SEC Br., App. L, 117a-118a, 121a-122a. The Court has never said, however, whether *Mitsubishi* and *Vimar* apply to claims under the securities laws.

There is considerable confusion, moreover, in the lower courts as to the meaning and applicability of the Court's statements in *Mitsubishi* and *Vimar*. The Ninth Circuit and the Fifth Circuit say, in contrast with the SEC's view, that the statements in *Mitsubishi* and *Vimar* only govern choice clauses that waive remedies under the antitrust statutes and COGSA — not securities law remedies.[19] The Second and Seventh Circuits, unlike the Ninth and Fifth, recognize that *Mitsubishi does* apply to securities claims.[20] Those courts, however, have not interpreted *Mitsubishi* — as the SEC does (App. L, 117a-118a, 121a-122a) — to prohibit all waivers of statutory remedies. Rather, those courts say that *Mitsubishi* permits a court to enforce choice clauses that effectuate such waivers if the court concludes that

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[19] *See* App. A, 11a-12a & n.5; *Haynsworth v. Corporation*, 121 F.3d 956, 968-69 (5th Cir. 1997), *cert. denied*, ___ U.S. ___ (1998).

[20] *See Roby*, 996 F. 2d at 1364 & n.3; *Bonny v. Society of Lloyd's*, 3 F.3d 156, 160 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994).

the remedies available in the chosen foreign forum are "adequate" substitutes for United States statutory remedies.[21] (*See* discussion *infra*, III). The Court should resolve the confusion among the circuits and make clear that the reasoning of *Mitsubishi* and *Vimar* precludes enforcement of choice clauses that waive *any* substantive federal statutory remedies.

Third, the Court held 35 years ago that a party may avoid a forum-selection clause by showing that inclusion of the clause itself was the product of fraud; a plaintiff can make such a showing by demonstrating that the defendant intended the clause to effect a fraudulent scheme. *See Moseley*, 374 U.S. at 170-71, *followed, Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967); *see also Scherk*, 417 U.S. at 519 n.14. The lower courts have not, however, applied *Moseley* consistently. The Sixth Circuit, following *Moseley*, has held that a forum-selection clause is unenforceable if the defendant included the clause for the purpose of getting away with an over-arching scheme to defraud.[22] In contrast, the Ninth Circuit here refused to follow *Moseley* solely because of a procedural nuance in *Moseley* that the Sixth Circuit did not mention. (*See* discussion *infra*, IV). The Court should accept review in this case to resolve the circuit split concerning the scope of *Moseley*.

B. Resolving The Questions Presented Will Bring Certainty and Predictability to Federal Court Proceedings Far Beyond the Parties and Transactions Involved Here

The foregoing issues "have immediate importance far beyond the particular facts and parties involved" here.[23] Contracts regularly include forum-selection clauses, often in tandem with choice-of-law clauses. Such clauses affect "many

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[21] *See Roby*, 996 F.2d at 1356-66; *Bonny*, 3 F.3d at 160.

[22] *See CBS Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 912 F.2d 1563, 1568 (6th Cir. 1990).

[23] Chief Justice Fred M. VINSON, *Work of the Federal Courts*, Address Before the American Bar Association (September 7, 1949) *in* 69 S. Ct. v, vi.

American consumers, patients, workers, investors, shopkeepers, shippers, and passengers".[24] The lower courts' repeated enforcement of Lloyd's Choice Clauses, and this Court's repeated denial of review (*see* discussion *infra*, II.A), allows foreign parties to evade liability under United States securities law resulting from transactions with United States residents conducted within United States territory. That is a previously-unprecedented result,[25] and it has drawn much academic attention and criticism.[26]

The SEC observes, moreover, that foreign forum-selection clauses — like Lloyd's clauses — have serious ramifications for enforcement of the securities laws. The Ninth Circuit's holding that such clauses are valid

> would allow foreign promoters of securities undertaking large scale selling efforts in the United States to avoid private liability...even if the remedies available under the foreign law were far less effective than those available under United States law. Such a holding would seriously impair the ability of defrauded investors to obtain compensation for their losses, and would hamper the deterrent function of the federal securities laws by discouraging private actions.

App. L, 108a. Indeed, under such a holding,

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[24] Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 333 (1997).

[25] *Cf. Bremen*, 407 U.S. at 16 (enforcing clause despite apparent conflict with United States policy because "'[h]ere the conduct in question is that of a foreign party *occurring in international waters outside our jurisdiction*.'") (quoting lower court dissent) (emphasis added).

[26] *See* Darrell Hall, Note, *No Way Out: An Argument Against Permitting Parties to Opt Out of U.S. Securities Laws in International Transactions*, 97 COLUM. L. REV. 57 (1997); David A. Fitzgerald, Note & Comment, Allen v. Lloyd's of London: *A Comment on Forum Selection*, 30 CONN. L. REV. 257 (1997); Jennifer M. Eck, *Turning Back the Clock: A Judicial Return to Caveat Emptor for U.S. Investors in Foreign Markets*, 19 N.C. J. INT'L L. & COM. REG. 313 (1994).

> a clever entrepreneur might even add a conspicuous provision on its Web page that persons placing orders [for securities] with it thereby accept a forum selection provision that makes the courts of the host country the exclusive forum in which a private action may be maintained against it.

John C. Coffee, *Brave New World? The Impact(s) of the Internet on Modern Securities Regulation*, 52 BUS. LAW. 1195, 1228 & n.120 (1997) (citations omitted).

The distinction drawn by the Ninth Circuit between wholly domestic transactions, on the one hand, and transnational transactions of the kind at issue here, also has far reaching effect. The large volume and varied forms of modern transnational dealing have blurred distinctions that may have existed in the early 1970's — when *Bremen* and *Scherk* were decided — between wholly domestic contracts and predominantly international contracts. Indeed, some lower courts and commentators interpret *McMahon* as having abandoned any such distinction. *See* 482 U.S. at 229 (applying, in a purely domestic case, the standard adopted in *Scherk*, a "truly international" case).[27] The en banc Ninth Circuit's resurrection of that distinction not only injures United States investors and consumers, but also gives sophisticated foreign parties a marked advantage over their United States competitors.

> Enforcing the choice clauses gravely disadvantages American businesses, because foreign businesses, like Lloyd's, can recruit investors without expending the

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[27] *See Kotam Elecs., Inc. v. JBL Consumer Prods., Inc.*, 93 F.3d 724, 727 & n.5 (11th Cir. 1996) (en banc) ("In *McMahon*, the Supreme Court...discarded the distinction between domestic and international transactions..."), *cert. denied*, 117 S. Ct. 946 (1997); G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 U.C.L.A. L. REV. 623, 624 n.7 (1988) ("The *McMahon* Court made no distinction between the international and domestic arbitral forums..."), *quoted with approval, Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1442 (9th Cir.) (panel decision), *cert. denied*, 513 U.S. 1044 (1994).

> time and money involved in fulfilling the requirements of the Acts — a burden that American businesses cannot legally evade.

En banc dissent App. A, 20a-21a.

II. The Ninth Circuit's Failure to Apply the Anti-Waiver Statutes Conflicts With This Court's Precedent

A. This Court's Decisions Preclude A Judge-Made Exception to the Anti-Waiver Statutes

The Ninth Circuit's creation of a judge-made exception to the anti-waiver statutes for international forum-selection clauses clashes directly with the holdings of this Court, as conveyed in opinions authored or joined by every current Justice.

Stewart shows that *Bremen* does not control when a statute itself governs "the immediate issue before the court." *Stewart*, 487 U.S. at 28. *See also id.* at 33 (KENNEDY, J., joined by O'CONNOR, J., concurring "in full"); *id.* (SCALIA, J., dissenting). The Court has consistently followed *Stewart's* rationale. When faced with an anti-waiver statute in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), the Court analyzed the effect of that statute upon the enforceability of a forum-selection clause separately from its analysis under *Bremen*. *Compare Carnival*, 499 U.S. at 595-97 *with id.* at 590-95; *see also id.* at 598-605 (STEVENS, J., dissenting). Similarly, in *Vimar*, the Court said "[t]he relevant question" is whether a forum-selection clause would subject the plaintiff to substantive foreign law that, by reducing the defendant's obligations to the plaintiff, thereby violates a relevant anti-waiver statute. 515 U.S. at 539; *accord id.* at 548 n.8 (STEVENS, J., dissenting). The Ninth Circuit erred in disregarding the statutory analysis required by *Stewart, Carnival* and *Vimar*. See panel majority, App. C, 38a-39a.

The Ninth Circuit's holding that policy considerations under *Bremen* trump the clear language of the anti-waiver

statutes also conflicts with this Court's decisions refusing to create judicial exceptions to clear legislation in other statutory contexts. Speaking through Justice SCALIA, the Court recently explained, "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so..." *Brogan v. United States*, 118 S. Ct. 805, 811-812 (1998). Rather, "we are bound to take Congress at its word" when a statute "implements Congress' policy via a strict, unqualified statutory stricture on waivers." *Oubre v. Entergy Operations, Inc.*, 118 S. Ct. 838, 841 (1998) (maj. op. of KENNEDY, J.). When Congress has enacted clear legislation, "we...give effect to this plain command, even if doing that will reverse the longstanding practice under the statute..." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 962 (1998) (maj. op. of SOUTER, J.) (citations omitted); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (maj. op. of THOMAS, J.) (quoted by en banc dissent, App. A, 17a); *United States v. Rutherford*, 442 U.S. 544, 555 (1979) (unanimous op.) (quoted in en banc dissent, App. A, 16a-17a). The en banc dissent recognized the constraint that these holdings impose on the construction of statutes by lower courts. App. A, 16a-18a. The en banc majority disregarded that constraint entirely.

The Ninth Circuit's judge-made exception to the anti-waiver statutes is, moreover, ripe for this Court's review. The Court has previously denied review of several lower court decisions that enforced the Choice Clauses without addressing whether the clear text of the securities anti-waiver provisions voids those clauses. Unlike the en banc majority's decision here, however, those decisions either failed to mention the anti-waiver statutes, or treated those statutes as mere expressions of public policy rather than as legislative commands.[28] Those decisions therefore did not address whether *Bremen* and *Scherk*

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[28] *See Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.) (enforcing Choice Clauses without mentioning anti-waiver statutes), *cert.*

(footnote continues)

trump the anti-waiver statutes for transactions involving an international party — or whether, instead, the reasoning of *Stewart* controls. Earlier this Term, the Court denied certiorari in another such case. *See Haynsworth*, 121 F.3d at 965-66 (concluding that the Choice Clauses do not "contravene[ ] *public policy* as embodied in the anti-waiver provisions") (emphasis added). The *Haynsworth* decision, however, did not even mention *Stewart*. The Court should review now the Ninth Circuit's judge-made exception to the anti-waiver statutes for international transactions.

B. The Ninth Circuit's Refusal to Enforce the Anti-Waiver Statutes Conflicts with This Court's Decisions in *McMahon* and *Rodriguez*, and Misapplies *Scherk*

In refusing to hold Lloyd's Choice Clauses void under the anti-waiver statutes, the Ninth Circuit said that *Bremen* "contemplated" that, in international transactions, "a forum selection clause may conflict with relevant statutes". App. A, 7a. Further, according to the Ninth Circuit, *Scherk* left "little doubt" that *Bremen*, rather than the anti-waiver statutes, governs enforceability of forum-selection clauses in international transactions. *Id.* 7a. The Ninth Circuit's holding conflicts squarely with *McMahon* and *Rodriguez*, and misapplies *Scherk*.

The Ninth Circuit's reliance on *Scherk* conflicts with *McMahon* and *Rodriguez* in two critical ways. First, the Ninth Circuit's interpretation of *Scherk* is completely at odds with *McMahon's* explanation of *Scherk's* holding, and with the

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(footnote continued)

denied, 506 U.S. 1021 (1992); *Roby*, 996 F.2d at 1364 ("By including antiwaiver provisions in the securities laws, Congress made clear its intention that the *public policies* incorporated into those laws should not be thwarted.") (emphasis added), *cert. denied*, 510 U.S. 945; *see also Bonny*, 3 F.3d at 160-61 (substantially the same), *cert. denied*, 510 U.S. 1113; *Allen v. Lloyd's of London*, 94 F.3d 923, 929 (4th Cir. 1996) ("We do not believe that enforcing [the Choice Clauses] in this case will subvert the United States securities laws' *policy*...") (emphasis added), *mandamus denied sub nom. In re Allen*, 138 L. Ed. 2d 1004 (1997).

Court's subsequent interpretation of the anti-waiver statutes in *Rodriguez*. In *McMahon*, Justice O'CONNOR explained for the Court that *Scherk* upheld an arbitration clause in an international transaction because — and *only* because — the foreign arbitral forum provided an adequate means of enforcing the parties' substantive rights under the 1934 Act:

> The decision in *Scherk* thus turned on the Court's judgment that under the circumstances of that case, arbitration was an adequate substitute for adjudication as a means of *enforcing the parties' statutory rights.*

McMahon, 482 U.S. at 229 (emphasis added).[29] Based on that explanation of *Scherk*, the Court construed the 1934 Act anti-waiver provision to permit arbitration clauses in domestic transactions because (and only because) such clauses preserve substantive statutory rights. *McMahon*, 482 U.S. at 229-32. *Rodriguez* further explained that the anti-waiver provisions preclude contractual waivers of "substantive" securities provisions, "such as the provision [in 1933 Act § 12(a)(2)] placing on the seller the burden of proving lack of scienter when a buyer alleges fraud." *Rodriguez*, 490 U.S. at 481.

McMahon and *Rodriguez* preclude enforcement of Lloyd's Choice Clauses precisely because those clauses do not preserve Petitioners' substantive rights under the securities laws, including Petitioners' rights under § 12(a)(2). The SEC as *amicus curiae* in the court below agreed. App. L, 112a-114a. The Ninth Circuit did not even mention *McMahon*, or the SEC's assertion that *McMahon's* construction of the anti-waiver statutes controls here. In direct conflict with *McMahon* and the SEC's

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[29] *See also Alberto-Culver Co. v. Scherk*, 484 F.2d 611, 618-19 (7th Cir. 1973) ("The text of the 1933 Act, like the text of the 1934 Act, renders void any waiver by a plaintiff of a defendant's obligation to comply with the statute.") (Stevens, J., dissenting), *rev'd*, 417 U.S. 506 (1974), *and cited in McMahon*, 482 U.S. at 268 n.2 (STEVENS, J., dissenting in part) *and Mitsubishi*, 473 U.S. at 646 (STEVENS, J., dissenting).

clearly expressed views, the Ninth Circuit's decision to enforce the Choice Clauses wipes out Petitioners' claims.[30]

Second, the Ninth Circuit's reliance on the Names' travel to England — which supposedly demonstrates "understand[ing]" by the Names that English law would control (App. A, 8a) — conflicts with *McMahon's* unequivocal statement that the anti-waiver provisions preclude *all* waivers, regardless of how voluntary the waivers might be:

> [t]he voluntariness of the agreement is irrelevant to this inquiry: if a stipulation waives compliance with a statutory duty, it is void under [1934 Act § 29(a)], whether voluntary or not.

482 U.S. at 230; *see also Rodriguez*, 490 U.S. at 482. Under *McMahon* and *Rodriguez*, the Names' purported voluntary "understand[ing]" that the Choice Clauses required English law is irrelevant. *See* SEC Br., App. L, 113a.[31]

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[30] In contrast to the burden of proof that 12(a)(2) places upon *defendants*, an English court would impose a burden of proof on *Petitioners* to show Lloyd's bad faith. English courts also would not grant any remedy like the remedy enacted in § 12(a)(1) for Lloyd's failure to register its securities offerings and make disclosure under 1933 Act §§ 5, 7(a). Neither would English courts require Lloyd's to show that it exercised due care in the control of Members' Agents and Managing Agents who violated the securities laws, pursuant to 1933 Act § 15 and 1934 Act § 20(a).

[31] The majority also believed that applying the anti-waiver statutes to forum-selection clauses in contracts between United States residents and a foreign party would "expand[ ] the reach of federal securities law to any and all such transactions, no matter how remote from the United States." App. A, 7a-8a. That concern wrongly conflicts with the text, legislative history, and settled judicial interpretation of the Acts. *See* en banc dissent, App. A, 21a-22a; SEC Br., App. L, 115a n.8 ("Lloyd's defendants can hardly claim surprise that they would be subject to United States law when they came to the United States seeking investment by Americans"); *SEC v. Chinese Consol. Benev. Ass'n*, 120 F.2d 738, 741 (2d Cir.) (A. Hand, J.), *cert. denied*, 314 U.S. 618 (1941); *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 121-24 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 702, 703 (1996).

Not only did the Ninth Circuit wrongly ignore *McMahon*, but it impermissibly extended the rationale of *Scherk* — which only applies to "truly international" agreements, 417 U.S. at 515 — to predominantly domestic transactions with foreign parties. The "truly international" transaction in *Scherk* involved an American corporation that expanded its overseas operations by (1) seeking out the seller of a business in Germany, (2) engaging foreign counsel and consultants to represent it in purchasing that business, and (3) negotiating in several different countries before signing a deal in Austria and closing in Switzerland. *See* 417 U.S. at 508-09, 515. This case is different. Indeed,

> the *Scherk* majority itself recognized that a contract with "insignificant or attenuated" contacts with foreign countries might well prompt a refusal to enforce a forum selection clause, let alone a clause choosing foreign law. *Scherk*, 417 U.S. at 517 n.11. The Court observed: "Judicial response to such situations can and should await future litigation in concrete cases." *Id.*

En banc dissent, App. A, 19a. Because this case involves only a trivial overseas meeting,[32] "[t]he instant case offers just such a concrete opportunity..." App. A, 19a. The Lloyd's securities offerings were no more international in character than any other United States securities transaction involving a foreign seller with global operations.

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[32] *See Roby*, 996 F.2d at 1357 ("a brief meeting in London—a mandatory formality").

III. The Lower Courts Misunderstand This Court's Public Policy Standards for Enforcing Forum-Selection Clauses under *Bremen*, As Explained By *Mitsubishi* and *Vimar*

The Ninth Circuit held that public policy permits enforcement of choice clauses that waive federal statutory remedies, so long as the remedies afforded by the foreign court are deemed "sufficient." App. A, 9a. This approach conflicts with *Bremen*, as explained by *Mitsubishi*, 473 U.S. at 637 n.19 (stating that Court would "condemn[ ]" choice clauses that, in tandem, waive statutory remedies), *quoted with approval, Vimar*, 515 U.S. at 540. The Ninth Circuit's refusal to follow *Mitsubishi* — together with decisions from other circuits — demonstrates, moreover, that the lower courts completely misunderstand how to apply *Bremen's* policy analysis.

The en banc majority declined to apply *Mitsubishi's* rationale — which the majority believed was "dictum...regarding antitrust law" — to the securities claims in this case, because the majority wrongly believed that *Scherk* compels enforcement of the Choice Clauses notwithstanding *Mitsubishi*. App. A, 11a-12a. According to the Ninth Circuit, *Scherk's* enforcement of a clause requiring foreign arbitration of a 1934 Act claim, based on *Bremen*, means that the anti-waiver statutes do not apply to forum-selection clauses, even if the foreign forum would not enforce the United States securities laws — for example, due to a foreign choice-of-law clause. This is so, said the Ninth Circuit, because *Scherk* "never suggested" that a foreign choice-of-law clause affects the validity of a forum-selection clause. App. A, 12a.[33]

By relying on *Scherk's* failure to address foreign choice-of-law clauses, the Ninth Circuit extended *Scherk's* holding far beyond the issue decided in that case. *Scherk's* failure to

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[33] The Fifth Circuit reached the same conclusion in *Haynsworth*, 121 F.3d at 968.

address foreign choice-of-law clauses stems not from any opinion that such clauses are irrelevant under the anti-waiver statutes, but rather from the fact that the contract in *Scherk* selected United States law, specifically the law of "Illinois, U.S.A." 417 U.S. at 508 n.1, 519 n.13. *See* en banc dissent, App. A, 18a. Thus, nothing in *Scherk* precludes applying *Mitsubishi*'s rationale to statutory federal securities remedies.

The Second and Seventh Circuits, moreover, disagree with the Ninth Circuit's conclusion that *Scherk* limits *Mitsubishi*. The Second and Seventh Circuits have both held that the *Mitsubishi* rationale *does* apply to securities law remedies — notwithstanding *Scherk*. "*Scherk*, decided eleven years before *Mitsubishi*, is not to the contrary." *Roby*, 996 F. 2d at 1364 n.3; *see also Bonny*, 3 F.3d at 160 (applying *Mitsubishi*).

Even though the Second and Seventh Circuits recognize that *Mitsubishi* applies to securities remedies, those courts nevertheless improperly interpret *Mitsubishi*. *Mitsubishi* and *Vimar* straightforwardly preclude enforcing choice clauses that waive statutory remedies. Both the Second and Seventh Circuits believe, however, that *Mitsubishi* permits enforcement of a forum-selection clause that waives statutory remedies if the court concludes that available foreign remedies are "adequate" to implement the policies that underlie the United States statute. *See Roby*, 996 F.2d at 1364-66; *Bonny*, 3 F.2d at 160-61. That is the same comparative law balancing that the Ninth Circuit incorrectly employed in attempting to apply *Bremen* and *Scherk* in this case. By undertaking that difficult endeavor,[34] the lower courts appropriated more judicial policy-making authority than *Mitsubishi* and *Vimar* permit, "in essence supplant[ing] their policy views of what laws are sufficient to protect United States investors for the determination made by Congress." SEC Br., App. L, 122a. The courts' ill-equipped attempts at such a quasi-

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[34] *See* panel majority, App. C, 40a (task undertaken by *Roby* and *Bonny* is "not easy"); id. 50a-51a (Goodwin, J., dissenting) (confronting "a difficult question"); *Roby*, 996 F.2d at 1363 (confronting "a serious question"); *Bonny*, 3 F.3d at 160 (expressing "serious concerns").

legislative comparative balancing has, moreover, led the courts into faulty reasoning and erroneous results.[35]

IV. The Ninth Circuit's Fraud Holding Conflicts With This Court's *Moseley* Decision, And With The Application of *Moseley* By the Sixth Circuit

The Ninth Circuit incorrectly enforced the Choice Clauses despite the undisputed evidence of Lloyd's fraud. In doing so, the court erroneously refused to follow *Moseley* — in direct conflict with the Sixth Circuit's adherence to *Moseley* in *CBS Employees*, 912 F.2d at 1568.

To invalidate a forum-selection clause based on fraud, a plaintiff must show fraud in the inducement of the clause itself, not merely fraud in connection with the contract generally. App. A, 14a (citing *Prima Paint*, 388 U.S. at 403-04; *Scherk*, 417 U.S. at 519 n.14).[36] *Moseley* held that fraud "goes to the arbitration clause itself" when, as in this case, "the insertion in the subcontracts of an arbitration clause" was "[o]ne of the means used to effect [the fraudulent] scheme". 374 U.S. at 171, *cited in Prima Paint*, 388 U.S. at 404 n.12 (construing the Federal Arbitration Act in a manner "consistent...with the decision in Moseley...").

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[35] For example, the Ninth Circuit held that English law provides "sufficient" protection to Names. App. A, 9a. But, as the SEC explains, that determination was wrong. *See* App. L, 119a-123a; en banc dissent, App. A, 19a-23a; panel majority, App. C, 40a-41a. *Roby's* policy balancing relied heavily on the SEC's "apparent judgment" that Lloyd's qualified its offerings for a regulatory exemption from registration and disclosure under 1933 Act 5. *See* 996 F.2d at 1365-66. But the SEC explains that it has never made any judgment that Lloyd's is exempt from registration and disclosure. App. L, 123a-125a. The other circuits that have addressed the Choice Clauses since *Roby* have all relied on *Roby's* policy analysis, without acknowledging that critical error in *Roby's* rationale. *See Bonny*, 3 F.3d at 161-62 (citing *Roby*); *Allen*, 94 F.3d at 929 (citing *Roby* and *Bonny*); *Haynsworth*, 121 F.3d at 969 n.28 (citing *Roby*, *Bonny* and *Allen*); App. A, 9a (citing *Roby*, *Bonny*, *Allen* and *Haynsworth*).

[36] *Moseley*, *Prima Paint* and *Scherk* involved arbitration clauses, which are merely specialized forum-selection clauses. *E.g.*, *Rodriguez*, 490 U.S. at 483; *Scherk*, 417 U.S. at 519.

Petitioners' unrebutted evidence demonstrates the type of fraud that voids forum-selection clauses under *Moseley*. Lloyd's knew its conduct violated United States law before it required Names to sign the Choice Clauses. App. A, 14a. Lloyd's knew that it had concealed the fact that it had saddled United States investors with billions of dollars of losses from asbestos and pollution liability risks[37] — in violation of the federal and state securities laws and state common law — and that losses from those risks would soon become known.[38] Lloyd's therefore had reason to fear that American Names would seek relief against Lloyd's under United States law in United States courts when the Names began to realize these asbestos and pollution liability losses.[39] Lloyd's induced Names to accept the Choice Clauses knowing that — because English courts will not enforce the Names' claims against Lloyd's under American law — the clauses would strip Names of all their United States law remedies. (*See* discussion *supra*, 5). That circumstantial evidence establishes that Lloyd's adopted the Choice Clauses to further a fraudulent scheme.[40]

The Ninth Circuit did not hold that Petitioners failed to show fraud of the type alleged in *Moseley*. Instead, the court incorrectly held that such a showing is insufficient as a matter of law. The Ninth Circuit first held that Lloyd's fraud is legally insufficient to defeat the Choice Clauses because that fraud "go[es] only to the contract as a whole," rather than to the Choice Clauses themselves. App. A, 14a. This is so, said the Ninth Circuit, because "[t]he Names never allege...that Lloyd's misled them as to the legal effect of the choice clauses [or that] Lloyd's fraudulently inserted the clauses without their knowledge." App. A, 14a. But *Moseley* held that evidence showing that a forum-selection clause was intended to effectuate a

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[37] *See* evidence cited in Names' Br. 5-6, 11-13.

[38] *See* evidence cited in Names' Br. 38.

[39] *See* evidence cited in Names' Reply Br. 41.

[40] "[C]ircumstantial evidence can be more than sufficient" to show fraud. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983).

fraudulent scheme — like Petitioners' unrebutted evidence here — *does* go to the validity of the clause itself, as a matter of law. 374 U.S. at 170-71. And, *Moseley* did not require allegations or evidence of deception as to the existence or legal effect of the clause.

Second, the Ninth Circuit attempted to distinguish *Moseley* on the basis of differences between the procedural posture in *Moseley* and the procedural posture here. App. A, 14a-15a. According to the Ninth Circuit, *Moseley* does not apply when a plaintiff seeks to invalidate a forum-selection clause in the same action where the defendant seeks to enforce the clause. App. A, 15a. *Moseley* is distinguishable, said the Ninth Circuit, because "[h]ere Lloyd's has clearly and vigorously called for the enforcement of the choice clauses," *id.*, whereas the defendant in *Moseley* sought to enforce the clause in a *separate* action from the plaintiff's action challenging the clause. 374 U.S. at 170. But *Moseley* placed no reliance on that procedural posture. As the Court later explained in a slightly different procedural context, "it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court." *Prima Paint*, 388 U.S. at 404.

The Ninth Circuit's holding also conflicts with the Sixth Circuit's holding in *CBS Employees*. Following *Moseley*, the Sixth Circuit held:

> Where, as here, the plaintiff affirmatively pleads that the contract and the arbitration agreement...were procured through fraud, the court should determine whether the arbitration clause was used to further the fraudulent scheme.

912 F.2d at 1568 (citing *Moseley* and *Prima Paint*). Unlike the Ninth Circuit, *CBS Employees* did not require allegations or evidence of deception as to the existence or legal effect of the clause. And the Sixth Circuit applied *Moseley's* central holding even though the *CBS Employees* plaintiff raised its challenge to

the clause in the same proceeding where the defendant tried to enforce that clause. *See* 912 F.2d at 1565.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAN RICHARDS, et al., *Plaintiffs-Appellants,* v. LLOYD'S OF LONDON, an unincorporated association, et al., *Defendants-Appellees.*	)	No. 95-55747 D.C. No. CV-94-01211-IEG
JOHN R. NORTON, III; DORIS S. NORTON; DIANE B. ALLISON; CHARLES G. BENTZIN; F.M. BINKLEY; DELMAR A. BRADY; SAMME JO BRADY; GEORGE MANING CLOSE; RUSSELL M. COLLINS; PETER DWARES; ROBERT FLESVIG; DONALD P. GALLOP; CHARLES A. GERLACH, JR.; ROBERT W. GERWIG; RICHARD C. HENRY; MICHAEL C. HIRSH; R. WILLIAM JOHNSTON; JAMES H. KAYIAN; JOANNE S. KAYIAN-OLOONEY; SUZANNE KAYIAN; LOWELL CONRAD LUNDELL; JUDITH M. OTT; H.E. RAINBOLT; DAVID L. ROSENBLATT; RAY MORSE SANDERSON; CLAIRE TILLMAN; WARREN G. VANDER VOORT; PETER	)	No. 95-56467 D.C. No. CV-95-00952-IEG OPINION

BECK; HAROLD FRANZ ILG; JOHN C. GRIFFIN; TED KOSLOFF; FRANCIS J. MILON; GLEN R. MOGAN; MELANIE M. NORTON; JOSEPH F. WELLER,
Plaintiffs-Appellants,

v.

LLOYD'S OF LONDON, an unincorporated association; CORPORATION OF LLOYD'S, aka Society of Lloyd's, aka The Society and Council of Lloyd's,
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of California Irma E. Gonzalez, District Judge, Presiding

Argued and Submitted October 23, 1997—San Francisco, California

Filed February 3, 1998

Before: Procter Hug, Jr., Chief Judge, Alfred T. Goodwin, Harry Pregerson, Alex Kozinski, Stephen S. Trott, Ferdinand F. Fernandez, Pamela Ann Rymer, Andrew J. Kleinfeld, Michael Daly Hawkins, A. Wallace Tashima, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Goodwin; Dissent by Judge Thomas

GOODWIN, Circuit Judge:

The primary question this case presents is whether the antiwaiver provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 void choice of law and choice of forum clauses in an international transaction. The district court found that they do not. The appeal has been argued twice. Upon reconsideration en banc, the opinion published at 107

F.3d 1422 (9th Cir. 1997) is withdrawn and we affirm the district court.

Background

Appellants, all citizens or residents of the United States, are more than 600 "Names" who entered into underwriting agreements. The Names sued four defendants: the Corporation of Lloyd's, the Society of Lloyd's, the Council of Lloyd's, (collectively, "Lloyd's") and Lloyd's of London, (the "unincorporated association").

Lloyd's is a market in which more than three hundred Underwriting Agencies compete for underwriting business. Pursuant to the Lloyd's Act of 1871-1982, Lloyd's oversees and regulates the competition for underwriting business in the Lloyd's market. The market does not accept premiums or insure risks. Rather, Underwriting Agencies, or syndicates, compete for the insurance business. Each Underwriting Agency is controlled by a Managing Agent who is responsible for the financial status of its agency. The Managing Agent must attract not only underwriting business from brokers but also the capital with which to insure the risks underwritten.

The Names provide the underwriting capital. The Names become Members of the Society of Lloyd's through a series of agreements, proof of financial means, and the deposit of an irrevocable letter of credit in favor of Lloyd's. To become a Name, one must travel to England to acknowledge the attendant risks of participating in a syndicate and sign a General Undertaking. The General Undertaking is a two page document containing choice of forum and choice of law clauses (collectively the "choice clauses"), which form the basis for this dispute. The choice clauses read:

> 2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be

governed by and construed in accordance with the laws of England.

2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's . . . .

By becoming a Member, the Names obtain the right to participate in the Lloyd's Underwriting Agencies. The Names, however, do not deal directly with Lloyd's or with the Managing Agents. Instead, the Names are represented by Members' Agents who, pursuant to agreement, stand in a fiduciary relationship with their Names. Upon becoming a Name, an individual selects the syndicates in which he wishes to participate. In making this decision, the individual must rely to a great extent on the advice of his Members' Agent. The Names generally join more than one underwriting agency in order to spread their risks across different types of insurance. When a Name undertakes an underwriting obligation, that Name is responsible only for his share of an agency's losses; however, his liability is unlimited for that share.

In this case, the risk of heavy losses has materialized and the Names now seek shelter under United States securities laws and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. The Names claim that Lloyd's actively sought the investment of United States residents to fill an urgent need to build up capital. According to the Names, Lloyd's concealed information regarding the possible consequences of the risks undertaken and deliberately and disproportionately exposed the Names to massive liabilities for which sufficient underwriting capital or reinsurance was unavailable.

This appeal does not address the merits of the underlying claims. It addresses only the Names' contention that their

disputes with Lloyd's should be litigated in the United States despite contract clauses binding the parties to proceed in England under English law. It also addresses whether default should have been entered against the unincorporated association.

Standard of Review

We review the district court's decision to enforce the choice clauses for abuse of discretion. *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 323 (9th Cir. 1996). As we are reviewing a Rule 12(b)(3) motion decision, we need not accept the pleadings as true. *Id.* at 324.

Whether the securities laws void the choice clauses is a question of law that we review de novo. *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997).

Discussion

The Names make three arguments for repudiating the choice clauses. They contend (1) that the antiwaiver provisions of the federal securities laws void such clauses, (2) that the choice clauses are invalid because they offend the strong public policy of preserving an investor's remedies under federal and state securities law and RICO and (3) that the choice clauses were obtained by fraud. We will address each of these in turn.

I .

We analyze the validity of the choice clause under *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), where the Supreme Court stated that courts should enforce choice of law

and choice of forum clauses in cases of "freely negotiated private international agreement[s]." *Bremen*, 407 U.S. at 12-13.[1]

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The Names dispute the application of *Bremen* to this case. They contend that Bremen does not apply to cases where Congress has spoken directly to the immediate issue — as they claim the antiwaiver provisions do here.

The Securities Act of 1933 (the "'33 Act") provides that:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

15 U.S.C. § 77n. The 1934 Securities Exchange Act (the "'34 Act") contains a substantially similar provision. 15 U.S.C. § 78cc(a). The Names seize on these provisions and claim that they void the choice clauses in their agreement with Lloyd's.

Certainly the antiwaiver provisions are worded broadly enough to reach this case. They cover "*any* condition, stipulation, or provision binding *any* person acquiring *any* security to waive compliance with *any* provision of this subchapter...." Indeed, this language is broad enough to reach any offer or sale of anything that could be alleged to be a security, no matter where the transaction occurs.

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[1] While the contract in *Bremen* did not contain a choice of law clause, the Supreme Court explicitly recognized that the forum selection clause also acted as a choice of law clause. *Id.* at 13 n.15 ("[W]hile the contract here did not specifically provide that the substantive law of England should be applied, it is the general rule in English courts that the parties are assumed, absent a contrary indication, to have designated the forum with the view that it should apply its own law.... It is therefore reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law.").

Nevertheless, this attempt to distinguish *Bremen* fails. In *Bremen* itself, the Supreme Court contemplated that a forum selection clause may conflict with relevant statutes. *Bremen*, 407 U.S. at 15 ("A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by *statute* or by judicial decision.") (emphasis added).

Moreover, in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the Supreme Court explicitly relied on *Bremen* in a case involving a securities transaction.[2] Echoing the language of *Bremen*, the Court found that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is ... an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Id.* at 516. *See Bremen*, 407 U.S. at 13-14 ("[A]greeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."). This passage should leave little doubt as to the applicability of *Bremen* to the case at hand.[3]

Indeed, were we to find that *Bremen* did not apply, the reach of United States securities laws would be unbounded. The Names simply prove too much when they assert that "*Bremen's* judicially-created policy analysis under federal common law is *not* controlling when Congress has expressed its will in a statute." This assertion, if true, expands the reach of

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[2] In *Scherk* the Supreme Court assumed without so ruling that the transaction involved securities. *Scherk*, 417 U.S. at 514 n.8. Because it is not altogether clear whether the investments here were securities, we too assume without deciding that the Names invested in securities.

[3] The Names also cite *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) in support of their position. *Stewart* does not aid the Names. It is true that *Stewart* held that before engaging in a *Bremen* analysis, "the first question [is] whether [28 U.S.C.] § 1404(a) itself controls respondent's request to give effect to the parties' contractual choice of venue." *Stewart*, 487 U.S. at 29. That case, however, involved a federal court sitting in diversity confronted with a purely domestic transaction. Thus it does not address this situation.

federal securities law to any and all such transactions, no matter how remote from the United States. We agree with the Fifth Circuit that "we must tread cautiously before expanding the operation of U.S. securities law in the international arena." *Haynsworth v. The Corporation*, 121 F.3d 956, 966 (5th Cir. 1997).

B

Having determined that *Bremen* governs international contracts specifying forum and applicable law, we turn to the question whether the contract between Lloyd's and the Names is international. Not surprisingly, the Names contend that these were purely domestic securities sales. They claim that Lloyd's solicited the Names in the United States and that the trip the Names made to England was a mere ritual without legal significance.

We disagree. The Names signed a contract with English entities to participate in an English insurance market and flew to England to consummate the transaction. That the Names received solicitations in the United States does not somehow erase these facts. Moreover, Lloyd's insistence that individuals travel to England to become a Name does not strike us as mere ritual. Lloyd's likely requires this precisely so that those who choose to be the Names understand that English law governs the transaction. Entering into the Lloyd's market in the manner described is plainly an international transaction.

II

We now apply *Bremen* to this case. *Bremen* emphasized that "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." *Bremen*, 407 U.S. at 15. The Court reasoned that "[t]he elimination of all [ ] uncertainties [regarding the forum] by agreeing in advance ... is an indispensable element in

international trade, commerce, and contracting." *Id.* at 13-14. Thus, "absent some compelling and countervailing reason [a forum selection clause] should be honored by the parties and enforced by the courts." *Id.* at 12. The party seeking to avoid the forum selection clause bears "a heavy burden of proof." *Id.* at 17.

The Supreme Court has identified three grounds for repudiating a forum selection clause: first, if the inclusion of the clause in the agreement was the product of fraud or overreaching; second, if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; and third, "if enforcement would contravene a strong public policy of the forum in which suit is brought." *Id.* at 12-13, 15, 18. The Names contend that the first and third grounds apply in this case.

A

The Names' strongest argument for escaping their agreement to litigate their claims in England is that the choice clauses contravene a strong public policy embodied in federal and state securities law and RICO. *See Bonny v. Society of Lloyd's,* 3 F.3d 156, 160-61 (7th Cir. 1993) (expressing "serious concerns" that the choice clauses offend public policy but ultimately ruling in Lloyd's favor), *cert. denied,* 510 U.S. 1113 (1994); *Roby v. Corporation of Lloyd's,* 996 F.2d 1353, 1364-66 (2nd Cir.) (substantially the same), *cert. denied,* 510 U.S. 945 (1993).

We follow our six sister circuits that have ruled to enforce the choice clauses. *See Haynsworth,* 121 F.3d 956; *Allen v. Lloyd's of London,* 94 F.3d 923 (4th Cir. 1996); *Shell v. R. W. Sturge, Ltd.,* 55 F.3d 1227 (6th Cir. 1995); *Bonny,* 3 F.3d 156; *Roby,* 996 F.2d 1353; and *Riley v. Kingsley Underwriting Agencies, Ltd.,* 969 F.2d 953 (10th Cir.), *cert. denied,* 506 U.S. 1021 (1992). We do so because we apply *Scherk* and because English law provides the Names with sufficient protection.

In *Scherk*, the Supreme Court was confronted with a contract that specified that all disputes would be resolved in arbitration before the International Chamber of Commerce in Paris, France. *Scherk*, 417 U.S. at 508. The arbitrator was to apply the law of the state of Illinois. *Id.* The Court enforced the forum selection clause despite then hostile precedent. [4] *Id.* at 520-21. *See Wilko v. Swan*, 346 U.S. 427 (1953), overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 485 (1989).

The Court's treatment of *Wilko* leaves little doubt that the choice clauses in this case are enforceable. In *Wilko*, the Supreme Court ruled that "the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act." *Wilko*, 346 U.S. at 435. In *Scherk*, the Court had before it a case where both the District Court and the Seventh Circuit found a forum selection clause invalid on the strength of *Wilko*. *Scherk*, 417 U.S. at 510.

In distinguishing *Wilko*, the Supreme Court stated that there were "significant and, we find, crucial differences between the agreement involved in Wilko and the one signed by the parties here." *Scherk*, 417 U.S. at 515. The first and primary difference that the Court relied upon was that "Alberto-Culver's contract ... was a truly international agreement." *Id.* The Court reasoned that such a contract needs, as "an almost indispensable precondition," a "provision specifying in advance the forum in which disputes shall be litigated *and the law to be applied.*" *Id.* at 516 (emphasis added).

Moreover, the Supreme Court has explained that, in the context of an international agreement, there is "no basis for a judgment that only United States laws and United States courts should determine this controversy in the face of a solemn agreement between the parties that such controversies be resolved elsewhere." *Id.* at 517 n.11. To require that "'American

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[4] The Court recognized that an agreement to arbitrate "is, in effect, a specialized kind of forum-selection clause." Scherk, 417 U.S. at 519.

standards of fairness' must ... govern the controversy demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries." *Id.*

These passages from *Scherk*, we think, resolve the question whether public policy reasons allow the Names to escape their "solemn agreement" to adjudicate their claims in England under English law. *Scherk* involved a securities transaction. *Id.* at 514 n.8. The Court rejected *Wilko*'s holding that the antiwaiver provision of the '34 Act prohibited choice clauses. *Id.* at 515-16. It also recognized that enforcing the forum selection clause would, in some cases, have the same effect as choosing foreign law to apply. *Id.* at 516, 517 n.11. Yet the Court did not hesitate to enforce the forum selection clauses. It believed that to rule otherwise would "reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts.'" *Id.* at 519 (quoting *Bremen*, 407 U.S. at 9). As the Supreme Court has explained, "'[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.'" *Id.* (quoting *Bremen*, 407 U.S. at 9).

Relying on *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 634 (1985), the Names argue that federal and state securities laws are of "fundamental importance to American democratic capitalism." They claim that enforcement of the choice clauses will deprive them of important remedies provided by our securities laws. The Supreme Court disapproved of such an outcome, the Names contend, when it stated that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id.* at 637 n.19.

Without question this case would be easier to decide if this footnote in *Mitsubishi* had not been inserted. Nevertheless, we

do not believe dictum in a footnote regarding antitrust law outweighs the extended discussion and holding in *Scherk* on the validity of clauses specifying the forum and applicable law. The Supreme Court repeatedly recognized in *Scherk* that parties to an international securities transaction may choose law other than that of the United States, *Scherk*, 417 at 516, 517 n.11, 519 n.13, yet it never suggested that this affected the validity of a forum selection clause. *See also Bremen*, 407 U.S. at 13 n. 15 (recognizing that a forum selection clause also acts to select applicable law); *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 767 n.7 (D.C. Cir. 1992) ("*The Bremen* involved a choice-of-forum clause, but the Supreme Court recognized that enforcing the provision would have the effect of subjecting the contract to foreign law."). [5]

B

Of course, were English law so deficient that the Names would be deprived of any reasonable recourse, we would have to subject the choice clauses to another level of scrutiny. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) ("It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness."). In this case, however, there is no such danger. *See Haynsworth*, 121 F.3d at 969 ("English law provides a variety of protections for fraud and misrepresentations in securities transactions."). *Cf. British Midland Airways Ltd. v.*

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[5] The Names also point to *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), as support for their position. In *Vimar*, the Supreme Court expressed concern that a forum selection clause combined with a choice of law clause would deprive a party of remedies under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300 et seq. *Id.* at 539. The Court's reasoning in *Vimar*, however, does not extend to the instant case as *Vimar* involved COGSA, a statute designed to address international transactions. *Id.* at 537 ("COGSA is the culmination of a multilateral effort to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers inter se in international trade.") (internal quotations and citation omitted).

International Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974) (This court is "hardly in a position to call the Queen's Bench a kangaroo court.").

We disagree with the dramatic assertion that "[t]he available English remedies are not adequate substitutes for the firm shields and finely honed swords provided by American securities law." *Richards v. Lloyd's of London*, 107 F.3d 1422, 1430 (9th Cir. 1997). The Names have recourse against both the Member and Managing Agents for fraud, breach of fiduciary duty, or negligent misrepresentation. Indeed, English courts have already awarded substantial judgments to some of the other Names. *See Arubuthnott v. Fagan and Feltrim Underwriting Agencies Ltd.*, 3 Re LR 145 (H.L. 1994); *Deeny v. Gooda Walker Ltd.*, Queen's Bench Division (Commercial Court), The Times 7 October 1994. [6]

While it is true that the Lloyd's Act immunizes Lloyd's from many actions possible under our securities laws, Lloyd's is not immune from the consequences of actions committed in bad faith, including fraud. Lloyd's Act of 1982, Ch. 14(3)(e)(i). The Names contend that entities using the Lloyd's trade name willfully and fraudulently concealed massive long tail liabilities in order to induce them to join syndicates. If so, we have been cited to no authority that Lloyd's partial immunity would bar recovery.

C

The addition of RICO claims does not alter our conclusion. This court has already held that the loss of RICO claims does not suffice to bar dismissal for forum non conveniens. *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768-79 (9th Cir. 1991). We agree with our sister circuit that has considered this issue and extend the logic of *Lockman* to this case. *Roby*, 996 F.2d at 1366.

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[6] The Names complain that the Member and Managing Agents are insolvent. If so, this is truly unfortunate. It does not, however, affect our analysis of the adequacy of English law.

D

The Names also argue that the choice clauses were the product of fraud. They claim that at the time of signing the General Undertaking, Lloyd's knew that the Names were effectively sacrificing valid claims under U.S. law by signing the choice clauses and concealed this fact from the Names. Had the Names known this fact, they contend, they never would have agreed to the choice clauses. The Names never allege, however, that Lloyd's misled them as to the legal effect of the choice clauses. Nor do they allege that Lloyd's fraudulently inserted the clauses without their knowledge. Accordingly, we view the allegations made by the Names as going only to the contract as a whole, with no allegations as to the inclusion of the choice clauses themselves.

Absent such allegations, these claims of fraud fail. The Supreme Court has noted that simply alleging that one was duped into signing the contract is not enough. *Scherk*, 417 U.S. at 519 n.14 (The fraud exception in *Bremen* "does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud ... the clause is unenforceable."). For a party to escape a forum selection clause on the grounds of fraud, it must show that "*the inclusion of that clause in the contract* was the product of fraud or coercion." *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)) (emphasis in original). *See also Prima Paint*, 388 U.S. at 404 ("[T]he statutory language [of the United States Arbitration Act] does not permit the federal court to consider claims of fraud in the inducement of the contract generally.").

E

The Names object that *Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963), requires the district court to adjudicate the claims of fraud before dismissal. In *Moseley*, the Supreme Court found that "it seems clear that the issue of fraud should first be adjudicated before the rights of the parties

under the [contracts] can be determined." *Id.* at 171. Taken out of context, this statement would seem to support the Names' position.

When viewed in context, however, it becomes clear that this statement in fact provides no aid to the Names. The Supreme Court required an initial adjudication of the fraud claim after noting that "no request has been made here for the enforcement of the arbitration agreement included within the [contracts.]" *Id.* at 170. It was only "[w]ith the pleadings in this posture" that the Supreme Court required a trial on the fraud claims. *Id.* at 171. Here Lloyd's has clearly and vigorously called for the enforcement of the choice clauses. Accordingly, *Moseley* does not apply to the instant case and the Names are not entitled to a trial on their claims of fraud.

III

Because we decide that the district court correctly ruled to enforce the choice clauses, the request to enter default against the unincorporated association is moot.

AFFIRMED.

THOMAS, Circuit Judge, with whom Judge Pregerson and Judge Hawkins join, dissenting.

The majority espouses a reasonable foreign policy, but one which emanates from the wrong branch of government. Congress has already explicitly resolved the question at hand. In the Securities Act of 1933 and the Securities Exchange Act of 1934 (the "Acts"), Congress expressly provided that investors cannot contractually agree to disregard United States securities law. Thus, in applying the "reasonableness" policy weighing approach of *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the majority displaces Congress' specific statutory directive. Furthermore, even assuming that the *Bremen* analysis applies here, the circumstances surrounding this dispute compel

the conclusion that enforcement of the choice clauses would be unreasonable. Accordingly, I respectfully dissent.

I.

Unlike the conflict the *Bremen* Court envisioned between statutes and forum selection clauses, the Acts do not merely declare "a strong public policy" against the waiver of compliance with United States securities laws. Rather, the Acts explicitly and unconditionally prohibit such a waiver. The language of the Securities Act of 1933 is clear and unambiguous:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

15 U.S.C. § 77n. The Securities Exchange Act of 1934 contains a similar restriction. *See* 15 U.S.C. § 78cc(a).

Absent these antiwaiver provisions, courts could appropriately examine choice-of-forum clauses in investment contracts under a *Bremen* analysis to determine whether they violated the strong public policy of the United States as embodied in our securities law. However, the Acts' antiwaiver provisions decisively alter this inquiry. With adoption of those sections, Congress announced a per se rule that American laws cannot be ignored in this context. Courts should not employ amorphous public policy to emasculate plain statutory language. "Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *United States v. Rutherford,* 442 U.S. 544, 555 (1979). Rather, "[o]nly when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied." *Id.* Because Congress quite reasonably intended that our securities laws be enforced

even when a salesperson managed to obtain an investor's waiver, we "have no license to depart from the plain language" of the Acts. *Id.*

The majority turns this analysis inside out, by holding that underlying antiwaiver public policy eviscerates specific anti-waiver statutory provisions. Disregarding this express prohibition to assess whether enforcement of the choice clauses contravenes the underlying policy against waiver is akin to overlooking the plain language of a statute to consider its legislative history, a clearly disfavored method of statutory interpretation. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.... When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.... It would be dangerous in the extreme to infer ... that a case for which the words of an instrument expressly provide, shall be exempted from its operation.") (citations and internal quotation marks omitted). As the majority concedes, the explicit language of the Acts bars the waiver that the choice clauses would effectuate here. Thus, the "unadorned words" of the Acts' antiwaiver provisions should not be limited by the antiwaiver public policy they impliedly express, *see Germain*, 503 U.S. at 254.

The majority's fears notwithstanding, it is unnecessary to displace Congress' reasoned judgment in order to contract the "boundless" reach of United States securities laws. First, because plaintiffs alleging securities fraud will at some point have to establish that the disputed transactions involved "securities," as defined under United States law, plaintiffs cannot gain unfettered access to the protection of the securities laws simply by alleging that they have purchased securities. Second, the plaintiffs here do not seek to invoke the Acts' substantive remedies in the context of transactions that enjoy only an incidental nexus with the United States. Lloyd's recruited the plaintiffs, residents of the United States, in the

United States, often using United States brokerage firms and recruiters, and availed itself of the United States mails to disseminate information about becoming a Name. In short, Lloyd's purposefully devoted considerable time and resources to recruiting American investors through specifically American media. To penalize the plaintiffs in this case based upon a hypothetical scenario that differs dramatically from the circumstances at issue here would work an unjust deprivation of the plaintiffs' rights under the Acts.

The majority argues that the Supreme Court's reliance on *Bremen* in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), should control here. However, the majority overlooks the crucial differences between the instant dispute and the facts underlying *Scherk*. *Scherk* involved a contract that contained an agreement to arbitrate any disputes arising out of the contract in Paris, France. This contract specified that "[t]he laws of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance." *Scherk*, 417 U.S. at 508. In contrast, the choice clauses here not only select the forum — the courts of England — but mandate that English law shall govern any controversy. Thus, the reasoning and conclusions of *Scherk* should not extend to this case. To the extent that the *Scherk* Court approved a hypothetical choice-of-law clause that prescribed the application of foreign law, such approval was dicta and cannot bind the parties here.

Furthermore, the Lloyd's underwriting agreements had substantial connections with the United States, in contrast with the sparse contacts between the United States and the contract in *Scherk*. In *Scherk*, an American company made an initial contact with *Scherk*, a German citizen, in Germany, pursued negotiations with *Scherk* in both Europe and the United States, and finally executed a contract in Vienna, Austria, providing for the transfer of the ownership of *Scherk's* enterprises. The closing of this transaction occurred in Geneva, Switzerland. In comparison, the sole component of Lloyd's campaign to recruit American Names that took place in England was the committee

meeting that new Names attended in London. Otherwise, every aspect of the solicitation occurred in the United States. To characterize this extensive and multifaceted recruitment campaign as the mere receipt of "solicitations," as does the majority, is to understate the impact of Lloyd's activities in the United States.

The *Scherk* majority itself recognized that a contract with "insignificant or attenuated" contacts with foreign countries might well prompt a refusal to enforce a forum selection clause, let alone a clause choosing foreign law. *Scherk*, 417 U.S. at 517 n.11. The Court observed: "Judicial response to such situations can and should await future litigation in concrete cases." *Id.* The instant case offers just such a concrete opportunity to assess the enforceability of the choice clauses independently of the *Scherk* methodology and holding — an opportunity this court should use to effectuate Congress' explicit statutory directive.

Unfortunately, the majority has chosen to contravene an unequivocal Congressional mandate, founded on an interpretation of underlying public policy. However reasonable that policy, it cannot supplant clear, unambiguous statutory language.

II

In addition to violating the Acts' express antiwaiver provisions, the choice clauses are unenforceable because they are "'unreasonable' under the circumstances." *Bremen*, 407 U.S. at 10. Initially, the Supreme Court has twice stated that the type of clauses at issue here are invalid when they prospectively disable parties from pursuing statutory remedies. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985), *quoted in Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995). Indeed, in *Vimar*, the Court went so far as to declare that "[t]he relevant question" was "whether the substantive law to be applied [would] reduce the

carrier's obligations to the cargo owner below what [the Carriage of Goods by Sea Act] requires." *Vimar*, 515 U.S. at 539. In other words, the Court implicitly rejected the argument that a forum selection clause must be enforced even if some of the claims that could have been brought in the forum of the lawsuit must be forfeited.

As applied here, the logic of *Mitsubishi* and *Vimar* militates against enforcing the choice clauses. Not only do the choice clauses preclude the plaintiffs from seeking the substantive remedies the Acts offer, but the protections they provide under English law are markedly inferior to the Acts'. For instance, English law recognizes no remedy for the failure to register securities as required by section 12(1) of the Securities Act of 1933. Nor is there any English remedy against Lloyd's for negligent misrepresentation as provided by section 12(2) of the Securities Act of 1933, because the 1982 Lloyd's Act expressly immunizes Lloyd's from any claim for "negligence or other tort" unless bad faith was involved. [1] Third, no "controlling person" liability exists in England, whereas section 15 of the Securities Act of 1933 and section 20(a) of the 1934 Securities Exchange Act impose such liability. Thus, the choice clauses should not be enforced, because they afford a level of protection far lower than the remedies the Acts provide.

The stark differences between American and English securities laws in turn reveal additional public policy reasons for invalidating the choice clauses. Enforcing the choice clauses gravely disadvantages American businesses, because foreign businesses, like Lloyd's, can recruit investors without expending

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[1] While the plaintiffs may sue Members' and Managing Agents, who are not exempt from the 1982 Lloyd's Act, the Members' and Managing Agents are insolvent. The majority regards this insolvency, if true, as "truly unfortunate," but deems it irrelevant to the "analysis of the adequacy of English law." See *supra* note 6. However, it is equally reasonable to find English law all the more inadequate to address the plaintiffs' grievances, because the insolvency of one class of potential defendants so materially damages the plaintiffs' chances for recovery.

the time and money involved in fulfilling the requirements of the Acts — a burden that American businesses cannot legally evade. Invalidating the choice clauses therefore eliminates any artificial advantage that Lloyd's may have enjoyed in competing in the American insurance market. In addition, the Acts furnish a necessary regulatory check upon an otherwise virtually autonomous organization. As the British government itself concedes, Lloyd's is a self-governing body charged with regulatory functions. Hence, a refusal to enforce the choice clauses would not reflect a lack of deference to English law and courts, but would simply arise from the realization that externally imposed restraints may sometimes be appropriate to control the behavior of a self-regulating organization.

The majority rejects the applicability of *Mitsubishi* and *Vimar* to the choice clauses on two bases. First, the majority assails footnote 19 in *Mitsubishi* as mere dictum which cannot "outweig[h] the extended discussion and holding in *Scherk* on the validity of clauses specifying the forum and applicable law." Second, the majority objects to the extension of *Vimar* to the instant case, because *Vimar* involved the Carriage of Goods by Sea Act ("COGSA"), a statute attempting to ensure uniformity in international transactions.

This reasoning stands on tenuous ground. Initially, while footnote 19 in *Mitsubishi* was not incorporated into the Court's actual holding, the Court left no doubt about its position on this issue by reiterating it in the entirely different setting of *Vimar*. Hence, the Court implicitly indicated that its concerns about a potential deprivation of plaintiffs' access to statutory remedies were limited to neither the antitrust nor the COGSA context. Moreover, as explained above, to the extent that the *Scherk* Court speculated about the enforceability of a contractual provision selecting foreign law, such a discussion was dictum. As such, it warrants no greater deference than footnote 19 of *Mitsubishi*.

Finally, the majority errs in characterizing the Acts as purely domestic, as opposed to the internationally-oriented

COGSA. Congress intended the Securities Act of 1933 to bring the United States into line with the protections other nations gave the security-buying public, by protecting American investors against fraud and misrepresentation in the sale of securities in interstate and foreign commerce alike. In fact, Congress observed that the necessity for such legislation arose from "the fact that billions of dollars [had] been invested in practically worthless securities, both foreign and domestic, including those of foreign governments, by the American public through incomplete, careless, or false representations." The consequence, Congress concluded, was "dire national distress." S. Rep. No. 47, at 2 (1933). Not only does this legislative history establish the international, as well as domestic, perspective of the Securities Act of 1933, but it drives home the necessity for invalidating the choice clauses here. Allegations of Lloyd's "incomplete, careless, or false representations" about the plaintiffs' participation in the English insurance market are precisely the issue in this case. Most importantly, given the hundreds of millions of dollars that American Names have invested in Lloyd's underwriting agreements, the "dire national distress" that originally prompted Congress to adopt securities regulation legislation may well make an unwanted reappearance.

III.

Increasing access to international capital markets is a laudable goal, but one need not trample on United States securities laws to achieve it. Indeed, securitization of insurance risk is increasing, with some public offerings involving Lloyd's exposures. However, these insurance risk-backed securitized investments are marketed in conformance with securities law, with full disclosure to the investor. Indeed, the facts alleged in this case make a powerful argument for vigorous application of American securities laws. A company, whether foreign or domestic, should not be able to mislead American investors

with impunity into assuming unlimited liability for known losses with no possibility of financial gain.

When Congress voided waiver clauses, it meant what it said. The antiwaiver provisions of the Acts, whether as clear statutory directives or as embodiments of public policy, render the choice clauses unenforceable. The district court's dismissal of the plaintiffs' claims under the Acts should be reversed. Hence, I respectfully dissent.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
FEB 25 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ALAN RICHARDS, et al., *Plaintiffs-Appellants,* v. LLOYD'S OF LONDON, an unincorporated association, et al., *Defendants-Appellees.*	No. 95-55747 D.C. No. CV-94-01211-IEG

JOHN R. NORTON, III; DORIS S. NORTON; DIANE B. ALLISON; CHARLES G. BENTZIN; F.M. BINKLEY; DELMAR A. BRADY; SAMME JO BRADY; GEORGE MANING CLOSE; RUSSELL M. COLLINS; PETER DWARES; ROBERT FLESVIG; DONALD P. GALLOP; CHARLES A. GERLACH, JR.; ROBERT W. GERWIG; RICHARD C. HENRY;	No. 95-56467 D.C. No. CV-95-00952-IEG ORDER

MICHAEL C. HIRSH;
R. WILLIAM JOHNSTON;
JAMES H. KAYIAN;
JOANNE S. KAYIAN- OLOONEY; SUZANNE KAYIAN; LOWELL CONRAD LUNDELL; JUDITH M. OTT; H.E. RAINBOLT; DAVID L. ROSENBLATT; RAY MORSE SANDERSON; CLAIRE TILLMAN; WARREN G. VANDER VOORT; PETER BECK; HAROLD FRANZ ILG; JOHN C. GRIFFIN; TED KOSLOFF; FRANCIS J. MILON; GLEN R. MOGAN; MELANIE M. NORTON; JOSEPH F. WELLER,
Plaintiffs-Appellants,

v.

LLOYD'S OF LONDON, an unincorporated association; CORPORATION OF LLOYD'S, aka Society of Lloyd's, aka The Society and Council of Lloyd's,
Defendants-Appellees.

BEFORE: GOODWIN, Circuit Judge.

Appellant's Motion to stay the mandate pending petition for certiorari is GRANTED.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAN RICHARDS, et al., *Plaintiffs-Appellants,*	)	No. 95-55747
v.	)	D.C. No. CV-94-01211-IEG
LLOYD'S OF LONDON, an unincorporated association, et al., *Defendants-Appellees.*	)	
JOHN R. NORTON, III; DORIS S. NORTON; DIANE B. ALLISON; CHARLES G. BENTZIN; F.M. BINKLEY; DELMAR A. BRADY; SAMME JO BRADY; GEORGE MANING CLOSE; RUSSELL M. COLLINS; PETER DWARES; ROBERT FLESVIG; DONALD P. GALLOP; CHARLES A. GERLACH, JR.; ROBERT W. GERWIG; RICHARD C. HENRY; MICHAEL C. HIRSH; R. WILLIAM JOHNSTON; JAMES H. KAYIAN; JOANNE S. KAYIAN-OLOONEY; SUZANNE KAYIAN; LOWELL CONRAD LUNDELL; JUDITH M. OTT; H.E. RAINBOLT; DAVID L. ROSENBLATT; RAY MORSE SANDERSON; CLAIRE TILLMAN; WARREN G. VANDER VOORT; PETER BECK; HAROLD FRANZ ILG; JOHN C. GRIFFIN; TED KOSLOFF; FRANCIS J. MILON; GLEN R. MOGAN; MELANIE M. NORTON; JOSEPH F. WELLER, *Plaintiffs-Appellants,*	)	No. 95-56467 D.C. No. CV-95-00952-IEG OPINION

v.	)
LLOYD'S OF LONDON, an unincorporated association; CORPORATION OF LLOYD'S, aka Society of Lloyd's, aka The Society and Council of Lloyd's, *Defendants-Appellees.*	)

Appeals from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

Argued and Submitted
November 5, 1996—Pasadena, California

Filed March 6, 1997

Before: Alfred T. Goodwin, Charles Wiggins and
John T. Noonan, Circuit Judges.

NOONAN, Circuit Judge.

Alan Richards and 573 other individuals (collectively, the plaintiffs or the Names) brought suit against the Corporation of Lloyd's (Lloyd's) and against Lloyd's of London, a community of enterprises characterized by the plaintiffs as an Unincorporated Association (the Unincorporated Association). The plaintiffs alleged securities fraud under the Securities Act of 1933, 15 U.S.C. § 77a (the 1933 Act) and under the Securities Exchange Act of 1934, 15 U.S.C. § 78a (the 1934 Act). The suit also alleged related violations of the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. § 1961 et seq. (RICO). The plaintiffs further alleged breach of state Blue Sky

laws, breach of fiduciary duty, and common law fraud. On motion of the defendants under Fed. R. Civ. P. 12(b)(3) the district court dismissed the plaintiffs' action.

The primary question presented on appeal is whether forum selection and choice of law provisions in the contracts signed by the Names (the Choice Clauses) require the application of English law to the plaintiffs' claims and the confinement of these claims to the courts of England. Holding that the Choice Clauses are void because they violate the 1933 Act and the 1934 Act, we reverse the district court's dismissal of the Names' federal claims. We affirm the district court's dismissal of the claims under the Blue Sky laws and the common law claims. We remand for consideration by the district court the amenability to suit of the Unincorporated Association.

Without passing on the truth of the allegations, we set out the plaintiffs' case as it is alleged by them.

THE ALLEGATIONS

The Unincorporated Association is engaged in the business of writing insurance and reinsurance. Its principal place of business is London, England. Its principal parts consist of the corporation (Lloyd's, the other defendant in this case); underwriting agents; brokers; and syndicates of underwriters. The corporation, Lloyd's, is governed by the Council for Lloyd's; the Council has "virtually complete control" over all of the operations of Lloyd's, including the operations of the underwriting agents and the brokers, and "virtually dictates the exact form of agreements and contents of agreements that are to be used ... and dictates not only the policies but the practices of those who constitute the Lloyd's community."

The members of each syndicate underwriting insurance are known as Names. They are divided into Working Names, a group of insiders who devote essentially full time to the business of insurance at Lloyd's, and External Names, recruited

from all over the world. The Working Names control Lloyd's. The External Names are "totally passive investors" and "are absolutely prohibited" from being involved in the "underwriting process." They make a deposit, usually in the form of a letter of credit, equal to a percentage of the premium income they expect to receive in a given year from the underwriting syndicate of which they are members. They have several, not joint, liability on the policies written by the syndicate. The liability of each Name is unlimited.

Between 1970 and 1993 Lloyd's sought to increase its underwriting capacity and to do so undertook "a major recruitment program in the United States." Representatives of Lloyd's came to the United States to carry out the recruitment by offering investment contracts by which residents of the United States might become External Names at Lloyd's. Lloyd's provided printed information on its history and operations as part of the campaign. The United States mails were used to provide this information and to send questionnaires, applications, and agreements to potential Names resident in the United States. Brokerage firms in the United States were paid commissions by Lloyd's to recruit Names in this country. Existing Names in the United States were also given financial incentives to recruit additional Names here. The information furnished by Lloyd's did not meet the standards required of prospectuses by the Securities Exchange Commission (the SEC). The investment contracts offered by Lloyd's were securities but were not registered under either federal or state law.

As a result of its efforts, Lloyd's raised over $600 million in letters of credit and deposits furnished by residents of the United States who became External Names. Lloyd's also enormously expanded its underwriting capacity by securing the unlimited liability on insurance contracts from Lloyd's of 3,196 residents of the United States recruited to become External Names at Lloyd's. The plaintiffs are a portion of those so recruited.

Plaintiffs, the Names of this case, were defrauded by Lloyd's in at least one of two ways: (1) Lloyd's put them on syndicates reinsuring long tail asbestos and toxic waste claims which had arisen prior to these Names becoming members of such syndicates; (2) Lloyd's put them on syndicates carrying an unusual concentration of risks because of a reinsurance scheme (the LMX Spiral) that operated as a species of scam. In neither case did Lloyd's inform the plaintiffs of the magnitude of their exposure although Lloyd's was aware of the magnitude. In each case Lloyd's acted to benefit Working Members and other insiders at Lloyd's while pushing large liabilities foreseen by Lloyd's, but undisclosed by it, upon the unsuspecting and uninformed External Names of whom the plaintiffs form a portion.

In 1986, these plaintiffs each were required by Lloyd's to execute in the United States a contract with Lloyd's entitled "General Undertaking." Paragraph 2.1 of this agreement reads as follows: "The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking, shall be governed by and construed in accordance with the laws of England." Paragraph 2.2 of this agreement reads in relevant part as follows: "Each party irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at Lloyd's...." These two provisions, the Choice Clauses, had not been in General Undertakings prior to 1986 but that group of plaintiffs who had become Names prior to 1986 and signed earlier General Undertakings without the Choice Clauses were required by Lloyd's to execute the 1986 form as a condition of remaining as Names. The group of plaintiffs who became Names in 1986 and thereafter were required by Lloyd's to execute the 1986 form as a condition of becoming Names. To neither group of plaintiffs did Lloyd's disclose the information

it possessed as to the fraud or frauds being practised on them. The Choice Clauses were themselves obtained by fraud.

Such are the plaintiffs' allegations.

PROCEEDINGS

On October 9, 1994 the plaintiffs filed in the Southern District of California an amended complaint containing these allegations. The Unincorporated Association did not answer, and the plaintiffs moved for a default judgment against it. Invoking the Choice Clauses, Lloyd's moved to dismiss on the grounds of improper venue, also on grounds of forum non conveniens and/or res judicata. Various declarations were submitted by both sides as well as pleadings and judgments in other cases. In argument, Lloyd's relied on the Choice Clauses and forum non conveniens.

On April 28, 1995 the district court entered its order dismissing the complaint. "Forum-selection clauses," the court reasoned, "are presumptively valid," to be set aside only if "unreasonable" under the circumstances. Such circumstances, the court found, had not been shown here. Relying on *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993), the court held that the remedies available in England were sufficient to protect the American investors. Refining the Second Circuit's reasoning in *Roby*, the court noted that the SEC's inaction towards Lloyd's "undercuts or dilutes the strength of the policy argument that insufficient deterrence exists for Lloyd's" under the laws of England. The court found insufficient evidence to support the allegation that the Choice Clauses themselves were obtained by fraud.

The plaintiffs moved for reconsideration. On August 4, 1995 the district court denied this motion, adding: "The Dismissal Order dismissed plaintiffs' complaint in its entirety and as to all parties. Therefore the court dismisses as moot" plaintiffs' motion for a default judgment against the Unincorporated Association.

The plaintiffs appeal.

ANALYSIS

The validity of the Choice Clauses is first attacked by the plaintiffs on the ground that these clauses were themselves procured by fraud. On this point as it affects the jurisdiction of the district court, the allegations of the plaintiffs are not to be taken as true, as would be the rule in an ordinary motion to dismiss under Rule 12. To the contrary, we have held that such clauses are good, "[a]bsent some *evidence* submitted by the party opposing enforcement of the clause to establish fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive the party of a meaningful day in court...." *Argueta v. Banco Mexicano*, 87 F.3d 320, 324 (9th Cir. 1996) (italics in original) (quoting *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 280 (9th Cir. 1984)). The district court here found that the plaintiff had not produced sufficient evidence of fraud in the procurement of the Choice Clauses. We defer to this factual finding. For purposes of defeating the Rule 12(b)(3) motion and for purposes of this appeal (but not as the law of the case because the plaintiffs have not had the chance to present their full case), the Choice Clauses must be deemed not obtained by fraud.

We express no view on whether the Names' participation in Lloyd's constitutes the purchase of a "security" within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934. For purposes of this appeal, we assume the truth of the Names' allegation that Lloyd's was engaged in the offer and sale of securities. Determining whether the Names can prove this allegation will require further development of the record in the district court at trial or on summary judgment.

We turn to the validity of these clauses under the controlling statutes. Doing so, we take the plaintiffs' allegations

as to their causes of action to be true. We look not at evidence — for the plaintiffs do not have to prove their case at the pleading stage — but at what the plaintiffs say their case is.

The Statutes' Bar. Section 14 of the 1933 Act provides:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission [the SEC] shall be void.

15 U.S.C. § 77n. The bar of Section 29(a) of the 1934 Act is substantially the same. 15 U.S.C. § 78cc(a). The Choice Clauses operate to effect such waivers. Accordingly, under the precise terms of these two statutes, the Choice Clauses are void.

The district court made an error of law in supposing that the Choice Clauses were unenforceable only if unreasonable. Congress had already determined that such clauses were void. It was not for a court to weigh their reasonableness, not for a court to say whether they offended any policy of the United States. The policy decision had been made by the legislature.

Lloyd's asks us to look at *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) where the Supreme Court, 5-4, held that in "an international commercial transaction" the parties' agreement to arbitrate before the International Chamber of Commerce in Paris any controversy or claim that "shall arise out of this agreement" should be upheld despite the plaintiffs' reliance on § 10b of the 1934 Act. Lloyd's overlooks both the facts and the reasoning of this precedent. As to the facts: the property being purchased was that of three businesses organized under the laws of Germany and Liechtenstein. Negotiations for the contract took place in the United States, England and Germany and involved consultations with legal and trademark experts from these countries and from Liechtenstein. The contract was signed in Austria. The businesses being bought were engaged in activities, "largely if not entirely, directed to European markets." *Id.* at 515.

As to the reasoning: the Supreme Court stressed "the orderliness and predictability essential to any international business transaction" and the dangers presented by a "parochial refusal" to "enforce an international arbitration agreement." *Id.* at 516. The Supreme Court quoted with approval from *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972): "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." The Supreme Court said that for these reasons it held "that the provisions of the Arbitration Act cannot be ignored in this case." *Scherk*, 417 U.S. at 513. The Supreme Court relied on this act of Congress, 9 U.S.C. § 1, which it found to represent a policy not easily reconcilable with the Securities Exchange Act. *Id.* at 512 (referring to the Court's earlier statement in *Wilko v. Swan*, 346 U.S. 427 (1953)). With two federal statutes in conflict, the considerations of international commerce tipped the balance. An exception to "the clear provisions of the Arbitration Act" would not be accepted. *Scherk*, 417 U.S at 517.

The fragmentary contacts with the United States of the contract in *Scherk* distinguish that contract from the contracts here where, according to the allegations we must accept at this state of the pleadings as true, the offerees were recruited in the United States, agents of the offeror were paid in the United States, documents material to the contracts were mailed in the United States and executed in the United States, and residents of the United States invested large sums of money and remained liable to the full extent of their assets for indefinite amounts of money. Factually distinct from *Scherk*, the case is also distinct in terms of the statutes involved. As is apparent from the Supreme Court's reasoning, the Court in *Scherk* had to decide which one of two federal statutes to apply. It chose to apply the Arbitration Act. It did not weigh reasonableness or pit amorphous policy against a command of Congress.

Is there a significant difference between a *policy* objection to enforcement of the antiwaiver bars and a *statutory* obstacle to

such enforcement? We believe there is. Where a statute exists, a policy has been given form and focus and precise force. A statute represents a decision by the elected representatives of the people as to what particular policy should prevail, and how. A *policy* objection represents judicial reasoning in the area where the federal statutes, if they are to the contrary, must rule. A *statutory* obstacle represents a legislative determination that is of at least equal weight with another statute. Consequently, what was decided when the Arbitration Act stood in the way of the antiwaiver bars is not helpful when no statute stands in the way of their enforcement.

The Supreme Court in *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 n.15 (1985) has already declared in dicta in an antitrust case what it thinks of contract clauses operating in an international transaction, as the Choice Clauses do here, contrary to the statutes of the United States: "We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." There is no question that the Choice Clauses operate in tandem as a prospective waiver of the plaintiffs' remedies under the 1933 and 1934 Acts. If the Supreme Court would condemn such clauses where they work against a public policy embodied in statutes even though the statutes themselves do not void the clauses, a fortiori the Supreme Court would condemn similar clauses when they run in the teeth of two precise statutory provisions making them void.

There is an additional reason why application of the Choice Clauses is barred by precedent that explicitly refers to the statutory bars of the 1933 and 1934 Acts: In securities cases upholding arbitration clauses by virtue of the Arbitration Act, the Supreme Court has observed that arbitration changes procedure but that the arbitrators will apply the substantive securities law of the United States where that law is applicable.

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989); *Shearson/American Express v. McMahon*, 482 U.S. 220, 232 (1987). In *Scherk* because of the slight contacts with the United States the proper law to be applied was uncertain and so could be fixed by agreement. *See Scherk*, 417 U.S. at 516. The strong implication is that where there is substantial contact with the United States even the Arbitration Act could not authorize the waiver of the substantive protections of the 1933 and 1934 Acts. What the Supreme Court has in mind by "substantive" provisions of these Acts is illustrated by "the provision in section 12(2) of the 1933 Act placing on the seller the burden of proving lack of scienter when a buyer alleges fraud." *Rodriguez de Quijas*, 490 U.S. at 481. By this test, the Choice Clauses require the waiver of substantive provisions of the 1933 and 1934 Acts and are consequently void.

Lloyd's urges not as controlling but persuasive precedent the decision of other circuits in cases pursued by certain Names against Lloyd's. The first of these, *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992), *cert. denied*, 506 U.S. 1021 (1992) is a federal securities case against Lloyd's where the court did not discuss the statutory bars and where the issue was clouded by the presence of a clause requiring arbitration. It is not an apt precedent here.

We recognize that our holding creates a conflict with the interpretation of the Lloyd's Choice Clauses in other cases. *E.g., Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); and *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993). Although we do not lightly deviate from the conclusions of our fellow circuits, we are convinced that those cases improperly disregard the statutory antiwaiver provisions of the Securities Acts. A comprehensive review of these cases has recently come to the same critical conclusion. Darrell Hall, Note, *No Way Out: An Argument Against Permitting Parties to Opt Out of U.S. Securities*

Law In International Transactions, 97 Colum. L. Rev., 57, 74-78 (1997).

These other circuit courts examined whether the Choice Clauses are enforceable by applying an analysis announced in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). *The Bremen* held that choice-of-forum clauses should be enforced against a party unless it could show that enforcement would be unreasonable or unjust, or that the clause was invalid due to fraud or overreaching. *Id.* at 15. These other circuit courts interpreted *The Bremen* and *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991), as setting forth a "reasonableness" test to evaluate choice-of-forum clauses. *Allen*, 94 F.3d at 928; *Bonny*, 3 F.3d at 160; *Roby*, 996 F.2d at 1363. One factor making a clause "unreasonable," and hence unenforceable, is if enforcement of the clause would contravene a strong public policy of the forum state. *Allen*, 94 F.3d at 928; *Bonny*, 3 F.3d at 160; *Roby*, 996 F.2d at 1363. In *The Bremen*, the Supreme Court stated that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Bremen*, 407 U.S. at 15.

Applying this test, these other circuits have determined that the American securities laws do not prevent application of the Choice Clauses. Deciding that the remedies available under English law are adequate to effectuate the anti-fraud purposes of the American securities laws, these circuit courts concluded that the Choice Clauses were reasonable and should be enforced.

For instance, as posed by the Seventh Circuit in *Bonny*, "the fundamental question" became whether the remedies available in England subverted "the public policy" of the Acts. *Bonny*, 3 F.3d at 161. The court found that the plaintiffs could sue Lloyd's in England for fraud and for breach of contract; that they could sue Member's Agents for breach of fiduciary duty; that upon application of [an English] Secretary of State

they might obtain an injunction and remedial orders; and that, upon a finding of criminal liability under the [English] Financial Services Act, they "could potentially receive some compensation for their injuries. More importantly, such criminal penalties serve as an important deterrent against exploitation of United States investors." *Id.* In our view, however, the reasonableness of the Choice Clauses is not determinative of their enforceability. The Securities Acts' antiwaiver provisions themselves render the Choice Clauses void, making it unnecessary to examine whether enforcement of the clauses would be reasonable under the test set forth in *The Bremen* and *Carnival*. Notably, *The Bremen* did not involve the applicability of a statutory anti-waiver provision like that contained in the Securities Acts. The Supreme Court was reviewing a judgment of the Fifth Circuit holding that this choice-of-forum clause contained in an international admiralty contract was unenforceable because it was contrary to public policy.

Reading *The Bremen* closely dispels the notion that choice-of-forum clauses are generally disfavored. *The Bremen*, 407 U.S. at 10. Instead, those clauses are presumed valid, though the "reasonableness" test allows the presumption to be rebutted. *Id.* However, *The Bremen* did not apply the "reasonableness" analysis in the face of a statute purporting to decide the question of a choice-of-forum clause's enforceability. *The Bremen* announced a reasonableness test to evaluate choice-of-forum clauses when Congress has not directly spoken to the issue. The "unreasonableness" test does not apply here where Congress specifically enacted antiwaiver provisions in the Securities Acts.

Further support of this conclusion is found in the Supreme Court's *Carnival* decision, specifically in its discussion of the effect of the Limitation of Vessel Owner's Liability Act, 46 U.S.C.App. § 183c. The *Carnival Court* does not apply *The Bremen*'s "reasonableness" analysis to determine whether this statute renders unenforceable a choice-of-forum clause

contained in a contract between a cruise ship and a passenger. The Court discusses *The Bremen* analysis separately, concluding that the forum-selection clause is not unreasonable under *The Bremen* factors. When analyzing section 183c, however, the Court simply rules that the forum-selection clause did not violate the statute. *Carnival*, 499 U.S. at 596.

Congress was not ignorant of the potential international character of securities transactions. Congress specifically modified the 1933 Act to cover transactions in foreign commerce. S. Rep. No. 47, 73d Cong., 1st Sess. (1933) (accompanying S. 875.) A court should not apply the reasonableness test or say whether the clauses offended any policy of the United States when Congress has expressly made that determination. We do not believe that we should turn the clock back to 1929 or introduce caveat emptor as the rule governing the solicitation in the United States of investments in securities by residents of the United States. *See* Jennifer M. Eck, "*Turning Back The Clock: A Judicial Return to Caveat Emptor For U.S. Investors In Foreign Markets*", 19 N.C.J. Int'l L. & Com. Reg. 313 (1994).

The dissent makes several remarkable rhetorical points: (1) Our decision means that Americans betting on chicken fights in Zamboanga could sue for breach of American securities law. (2) Our decision subjects Lloyd's "to the varying requirements of the different countries in which the Names might reside." (3) It is "unlikely" that, without the Choice Clauses, Lloyd's would engage in underwriting risks at reasonable premiums. More dispassionate conclusions would be that Americans can sue over a foreign gaming venture only if its securities are peddled in the United States; subjecting sales of Lloyd's securities to our securities laws says nothing at all as to the legal fate of Lloyd's in the rest of the world; and Lloyd's will go on writing insurance as long as the business is profitable, Lloyd's will merely be more circumspect in raising capital in the United States. The fundamental issue dividing the majority and minority does not depend upon rhetorical flourishes but on

whether the courts or Congress determines our national policy after Congress has spoken.

Even undertaking the analysis that the other circuits undertook, we cannot agree with their evaluation of the remedies available. In this not easy task we are aided by the SEC, which has entered this case on appeal as a friend of the court. We do not defer to its position as one arrived at by agency rulemaking (which has not occurred), but we do draw on the SEC's expertise when it points to the deficiencies in the remedies provided the plaintiffs by English law. Three major deficiencies exist: (1) There is no remedy in England for failure to register securities as required by Section 12(1) of the 1933 Act. (2) There is no remedy in England against Lloyd's for negligent misrepresentation as provided by Section 12(2); the Lloyd's Act, 1982, expressly immunizes Lloyd's from any claim "for negligence or other tort, breach of duty or otherwise ... unless the act or omission complained of ... was done or omitted to be done in bad faith." (3) In the United States there is liability for controlling persons under Section 15 of the 1933 Act and Section 20(a) of the 1934 Act; there is no such liability in England. We need not go further to list the various procedural and financial requirements noted by the plaintiffs which would act as hurdles to obtaining relief in England. Major gaps exist in the English substantive law of securities fraud. The available English remedies are not adequate substitutes for the firm shields and finely honed swords provided by American securities law.

The dissent believes a "plain, speedy and adequate remedy" exists if the plaintiffs had sued other defendants, some of whom the dissent acknowledges to be insolvent. Such hypothetical and derisory possibilities are not alternative remedies at all so far as concerns the defendants the plaintiffs did choose to sue. The dissent goes on to disparage suit in a federal court as a suit in California, a "plaintiff-friendly environment." The dissent takes no equivalent glance at the environment likely to surround American investors seeking

redress in London against Lloyd's of London, a business corporation so powerful that it has obtained from the British legislature substantial immunities. A plain, speedy, and adequate remedy for the wrongs alleged by the plaintiffs is not shown to exist in Britain.

The RICO Claims. The plaintiffs' Tenth Claim for Relief, for alleged violations of RICO, rests in part on allegations of "multiple acts of fraud in the sale of securities" in violation of the 1933 and 1934 Acts and in part on allegations of mail fraud in violation of 18 U.S.C. §§ 1341 and 1343. The allegations of securities fraud tie the RICO allegations to the federal securities claims but the bar on the waiver of rights under the Securities Acts is not a bar of waiver of rights under RICO, so our analysis of the Securities Act is not controlling. At the same time the record is bare as to what remedy an English court would provide a RICO claim. Consequently, we remand to the district court to determine in the light of this opinion whether the Choice Clauses are reasonable in their impact on the obligations established by RICO.

Forum non conveniens. Lloyd's asks us to affirm on the basis of forum non conveniens as a ground apparent on the record although not a ground adopted by the district court. We decline to do so. Dismissal for forum non conveniens requires a balancing of a multitude of factors first properly found and weighed by the district court. We do note the heavy burden to be sustained by the defendants in the light of our holding that Lloyd's by contract cannot avoid application of the federal securities statutes.

The Blue Sky Claims. The Blue Sky Law claims are pleaded perfunctorily and without reference to any particular state law prohibitions against the Choice Clauses. For the reasons stated by the several circuit courts that have upheld the Choice Clauses, we hold that they bind the parties in the absence of any statutory provision annulling them.

The Common Law Fraud And Breach Of Fiduciary Duty Claims. These claims, too, must be pursued according to the Choice Clauses. No statute of the United States is to the contrary. The English remedies appear adequate.

The Status Of The Unincorporated Association. Fed. R. Civ. P. 17(b) provides:

> The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.

See, e.g., Sierra Ass'n v. FERC, 744 F.2d 661, 662 (9th Cir. 1984).

The district court did not rule on the plaintiffs' motion to grant a default against the Unincorporated Association, which did not answer the plaintiffs' complaint. On remand, the district court should rule on the motion in the light of Rule 17(b) and in the light of such facts as the district court finds after a hearing.

CONCLUSION

For the reasons stated, the judgment of the district court is **AFFIRMED** in its dismissal of the Blue Sky law, common law fraud, and breach of fiduciary duty claims. The judgment of the district court is **REVERSED** as to its dismissal of the federal securities and RICO claims and the dismissal of the plaintiffs' default motion against the Unincorporated Association. The case is **REMANDED** to the district court.

GOODWIN, Circuit Judge, Concurring and Dissenting:

I would affirm the judgment dismissing the action pursuant to Fed. R. Civ. P. 12(b)(3). The Choice Clauses are valid and are not preempted by extraterritorial application of the United States securities laws.

Appellants, all citizens or residents of the United States, claim that Section 14 of the 1933 Act and Section 29a of the 1934 Act, give them the right to repudiate their insuring agreements. Section 14 reads: Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

The key question is whether the transactions described in the complaint made the appellants "persons acquiring any security." The majority concludes, without deciding whether these foreign insurance undertakings are securities, that the appellants have brought themselves within the protection of a law designed to protect domestic investors from being victimized by combinations of their own greed and the artifices of sellers of investment schemes. The majority holds that just because the Appellants alleged in their complaint that they were "persons acquiring any security," United States securities law renders void the carefully written terms of the engagements by which the Appellants brought themselves into the English insurance underwriting scheme popularly known as "Lloyd's of London."

The same reasoning would bring protections under our securities laws to any one who loses his or her savings betting on chicken fights in Zamboanga. An American could simply allege she had purchased a security, and thus repudiate any contractual obligations entered into around the world. There must be some limit to the reach of the United States government as nanny.

There are a number of prudential reasons, based on the augmentation of trade, as well as domestic legal reasons, based

upon United States precedent, why the majority's willingness to jettison solemn international contracts in order to pursue a perceived policy goal on the part of Congress must be called into question.

I accept, as one must for Rule 12(b)(3) purposes when examining pleadings, the majority's statement of the facts. But the facts as pled do not compel the majority's conclusions of law.

United States residents, having heard of the profits to be made and the risks to be run by investing in the worldwide underwriting pools in the peculiar form of risk insurance popularly known as Lloyd's of London, wanted to become "Names" (hereinafter referred to as Names). They ventured their assets, as all Names must, and those who lost money sued. Those who did not lose money apparently have not sued, but may be waiting in the wings to see how this case comes out and to sue if they ever do lose money. It is precisely this effect on the worldwide insurance business, and upon other international contracts, that makes this case strange, and troubling.

The Appellants did not sue in the courts of the United Kingdom, which they solemnly agreed to do if they deemed themselves wronged. Instead, they sought out the courts of this circuit, and repudiated that part of their agreement with the defendants which the Appellants found inconvenient to their litigation strategy.

It appears from their complaint, and reference to English law, that if Appellants can prove their essential facts, English law would provide a plain, speedy, and adequate remedy for any fraud that was practiced upon them, and fraud is what they now say made their bargain improvident.

The majority virtually ignores the contracts the parties negotiated and executed, contractual undertakings without which their opportunity to venture their assets would not have been open. The majority also ignores the century of historic success the nation's insurance lobby has enjoyed in keeping

federal law largely out of the insurance business. It assumes that because the Appellants claimed they had acquired securities, the securities laws trumped all other law that might bear upon the subject at hand.

The implications of this holding on international business transactions are not likely to lubricate commerce. Therefore, I would follow the other circuits that have enforced the Names' obligations to litigate their claims in the English courts. *See Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993); *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, 506 U.S. 1021 (1992); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996).

I. *International v. Domestic*

The Supreme Court indicated in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) that forum selection clauses are presumptively valid where the underlying transaction is fundamentally international in character. This presumption also holds for actions under the securities acts. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). The majority seeks to weaken *Scherk* by treating the dispute in this case as basically domestic. While Appellants allege that they were solicited in the United States and many Appellants signed the General Undertaking in the United States, international traders sign documents every day and transmit signatures electronically overseas with the locus of the signing a wholly immaterial historical fact. Signing a document in a ski lodge in Austria does not bring Austrian law to bear upon all future disputes arising out of the document. These arguments rehearse the usual "points of contact" aggregation that occurs in interstate litigation within the United States when competing state laws are invoked by the parties and the court must choose the law to apply in a diversity case. This is a diversity case, but it is not a points of contacts case. The case is about international commerce.

Appellants also argue that the ROTA Committee meeting in England that all Names must attend is simply a formality that should not have presumptive weight in determining whether to characterize these transactions as international. Becoming a Name is not a matter of empty formality. The ROTA Committee meeting is an essential part of becoming a Member.

Whether solicited in California or in Hong Kong, the Names freely and voluntarily contracted to become members of an English insurance marketplace that underwrites insurance worldwide. [1] Subjecting Lloyd's to the varying requirements of the different countries in which Names might reside would inject counterproductive uncertainty into the operation of the Lloyd's marketplace. Such uncertainty interferes with the smooth functioning and growth of global commerce, *see Bremen*, 407 U.S. at 9, and destroys the predictability needed for financial planning and for the resolution of disputes. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

Lloyd's structured its system to avoid this uncertainty and to create predictability through use of forum selection and choice-of-law clauses. *See Scherk*, 417 U.S. at 518; *Roby*, 996 F.2d at 1363. Further, international comity dictates that United States courts enforce choice-of-forum clauses out of respect for the integrity and competence of foreign tribunals. *See Mitsubishi*, 473 U.S. at 629. Finally, our failure to enforce the Choice Clauses could lead to "unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Scherk*, 417 U.S. at 516-17. If Lloyd's "had anticipated that [Appellants] would be able in this country to enjoin [enforcement of the forum selection clause, Lloyd's]

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[1] Appellants argue that their investment in Lloyd's is no different from an investment in any predominantly British company. However, other foreign companies do not have their own elaborate regulatory structure nor do other companies require investors to sign multiple agreements with foreign agents. Further, the Names knew they were subjecting themselves to this uniquely English regulatory structure.

might have sought an order in [England] enjoining [Appellants] from proceeding with [their] litigation in the United States." See id. at 517. In any event, without the certainty of the Choice Clauses, it is unlikely that Lloyd's would engage to underwrite, at premiums anyone would pay, the kind of risks in the various venues of the earth in which losses could occur.

II. *Are the Choice Clauses Unreasonable Under the Circumstances?*

The presumption in favor of choice-of-forum clauses in international transactions can be overcome by a clear showing that the clauses are "unreasonable under the circumstances." *Bremen*, 407 U.S. at 10. Forum selection clauses are unreasonable (1) if their incorporation into the agreement was the result of fraud or overreaching, *Bremen*, 407 U.S. at 12-13; (2) if the complaining party "will for all practical purposes be deprived of his day in court," due to the grave inconvenience or unfairness of the selected forum, *id.* at 18; (3) if the fundamental unfairness of the chosen forum may deprive the plaintiff of a remedy, *Roby*, 996 F.2d at 1363; or (4) if the clauses contravene a strong public policy of the forum state, *Bremen* 407 U.S. at 15.

A. *The Antiwaiver Provisions*

In international agreements, the Supreme Court has enforced choice clauses even where similar agreements in purely domestic transactions might not be recognized. Still, the majority holds that the antiwaiver provisions and the securities laws embody a public policy offended by the Choice Clauses. However, none of the other courts of appeals that have addressed the enforceability of the Choice Clauses in the General Undertaking have failed to enforce the forum selection clause. [2] *See Roby*, 996 F.2d 1353; *Bonny*, 3 F.3d 156; *Riley*, 969

[2] The issue before the Court involves the enforcement of the choice-of-forum clause on a Rule 12(b)(3) motion to transfer venue. The choice-of-law clause

(footnote continues)

F.2d 953; *Shell*, 55 F.3d 1227; *Allen*, 94 F.3d 923. *But see Leslie v. Lloyd's of London*, Civ. A. No. H-90-1907, 1995 WL 661090 (Aug. 20, 1995 S.D.Tex.).

It is true that none of the cited cases specifically addressed Appellants' contention, and the majority's holding, that the antiwaiver provisions explicitly prohibit the enforcement of the clauses. Rather, the courts engaged in judicial balancing to determine whether enforcement of the clauses would contravene the strong public policy embodied in the antiwaiver provisions. Judicial balancing is the appropriate course.

The other courts of appeals, citing *Bremen*, have implicitly crafted an exception to the antiwaiver provisions in international agreements where the remedies available in the selected forum are sufficient to "deter issuers from exploiting American investors." *Roby*, 996 F.2d at 1364; *see Bonny*, 3 F.3d at 161 (holding that so long as "remedies available in the selected forum [do not] subvert the public policy" of the securities laws the court will enforce the clauses). In *Bremen*, the Supreme Court enforced a choice-of-forum clause even though the English courts would give effect to an exculpatory clause in the contract that United States courts would not if the case arose in a domestic setting. *Bremen*, 407 U.S. at 15-16. The Court held that the "considerations with respect to the towage business strictly in American waters ... are not controlling in an international commercial agreement." *Id.* Further, the Court quoted the dissent in the court of appeals stating that "we should not invalidate the forum selection clause here unless we are firmly convinced that we would hereby significantly encourage negligent conduct within the boundaries of the United States." *Id.* at 16. Similarly here, we should not invalidate the Choice Clauses unless we are firmly convinced

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(footnote continued)

is relevant only because the incidental effect of enforcing the forum selection clause would lead an English court interpreting the choice-of-law clause to preclude operation of U.S. statutory law.

that England does not provide adequate remedies to deter fraud upon United States Names.

The majority disregards *Bremen* because it did not involve a federal statute but rather federal admiralty law. *Bremen*, however, does not rely on distinctions between statutory and judge made law. The *Bremen* Court stated that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Bremen*, 407 U.S. at 15 (emphasis added). [3] Also the majority attempts to argue that *Scherk* can be distinguished because the Court had a competing federal statute, the Arbitration Act, to reconcile with the securities laws. *Scherk*'s reliance on *Bremen* did not depend on the Arbitration Act. The Arbitration Act only placed arbitration provisions on equal footing with other contractual clauses, like choice-of-forum clauses. *See Scherk*, 417 U.S. at 511, (noting that the Arbitration Act puts arbitration agreements "upon the same footing as other contracts"); *Cange v. Stotler & Co.*, 826 F.2d 581, 595 (7th Cir. 1987) (Easterbrook, J., concurring) ("The Federal Arbitration Act was designed to reverse centuries of judicial hostility to arbitration not to make arbitration agreements more readily enforceable than other agreements." (citations and internal quotations omitted)). It did not make arbitration clauses more binding than choice-of-forum clauses.

Further, in cases discussing the extraterritorial effect of the securities laws, courts have been careful to examine the policies of the securities acts before expanding the securities acts and violating notions of international comity. *See Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir.

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[3] *Stewart Org., Inc. v. Ricoh*, 487 U.S. 22, 28 (1988), does not compel abandoning *Bremen* analysis in this situation. There the Court noted that the *Bremen* case "may prove instructive in resolving the parties' dispute," *Stewart*, 487 U.S. at 28, and unlike 28 U.S.C. § 1404(a) at issue in *Stewart*, the antiwaiver provisions do not specifically address transfer of venue.

1972); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975). [4] Although not done explicitly, the other circuits have determined that if the policies of the securities acts were adequately protected abroad, then the antiwaiver provisions should not operate to invalidate forum selection and choice-of-law clauses and force U.S. laws on parties who have chosen other law. Given the active judicial role in determining the scope of the securities laws in international transactions, I believe we should follow the lead of the other circuits and enforce the clauses if remedies in England are adequate to serve the policies of the securities laws. *See Roby*, 996 F.2d at 1364. The Names did not expect more when they volunteered to sign the General Undertaking.

B. *Public Policy of the Securities Acts*

In this case, English law adequately protects the policies embodied in the securities laws. Appellants have alleged violations of sections 12(1) and 12(2) of the 1933 Act, 15 U.S.C. § 77l(a), and section 10(b) and rule 10b-5 of the 1934 Act, 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. These sections are aimed "at prospectively protecting American investors from injury by demanding 'full and fair disclosure' from issuers," *Roby*, 996 F.2d at 1364, deterring fraud and manipulative practices in the securities markets, and compensating defrauded investors. See *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986). While English and American remedies are not identical, "the possibility of an unfavorable change in law" should not be dispositive unless the "remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254-55 (1981). [5] Though a

[4] The *Leasco* line of cases did not address the effect of international choice clauses on the applicability of the securities laws.

[5] *Piper* is a forum non conveniens case. If the possibility of an unfavorable change in the law does not control where the parties have not affirmatively selected a forum, then it certainly should not control where the parties have made a forum choice.

difficult question, English remedies seem to serve these policies adequately.

1. *Fraud and Manipulative Practices*

English law provides remedies for fraudulent, negligent, and even innocent misrepresentation. Further, section 47 of the English Financial Services Act creates penalties for misleading statements or omissions made knowingly or recklessly. *See Bonny*, 3 F.3d at 161. "While the ... Names might have been able to sue 'controlling persons' under the United States securities laws and establish liability without proving reliance, it is not unfair for English law to require proof of actual misconduct and reliance." *Roby*, 996 F.2d at 1365.

Although section 14 of the Lloyd's Act of 1982 exempts the Corporation of Lloyd's (and its officers and employees) from liability in damages, Lloyd's is not exempt for acts "done in bad faith." As fraud requires bad faith, even with section 14, Lloyd's remains liable in damages for fraud. Further, section 14 does not preclude the "grant of an injunction, a declaration or restitutionary relief against Lloyd's," and one of the remedies under English law for misrepresentation is rescission. Thus, even for negligent misrepresentation, Appellants may rescind their contract.

Finally, section 14 of the Lloyd's Act applies only to the Corporation of Lloyd's and not to Members and Managing Agents. Although these entities are not named in this action, the Lloyd's insurance market cannot function without them and thus suits against Members and Managing Agents will deter fraud by and lead to closer supervision by the entities named in this action.

2. *Disclosure*

English law provides Lloyd's entities with adequate inducement to disclose material information to American investors because failure to do so gives rise to liability for

breach of contract. The Members Agent's Agreement requires each Members' Agent promptly to provide information to Names regarding the Underwriting Syndicates. *See Roby*, 996 F.2d at 1366. Again, the Members Agents are not named in this suit. But the Lloyd's structure imposes the disclosure duties on the Members Agents and thus adequately assures appropriate disclosure.

3. *Compensation*

English law allows Appellants to recover damages from Lloyd's for fraud. Further, as an incident of a rescission remedy, Appellants may obtain indemnity against liabilities incurred. Additionally, Names have obtained judgments against Members and Managing Agents in England. *See Arbuthnott v. Fagan & Feltrim Underwriting Agencies, Ltd.*, [1994] 3 Re LR 145; *Deeny v. Gooda Walker Ltd.*, The Times, October 7, 1994 (Q.B. Commercial Ct.); *Henderson v. Merrett Syndicates, Ltd.*, 1992 Folio 1496 (Q.B. Commercial Ct.); *Henderson v. Merrett Syndicates, Ltd.*, [1994] 3 W.L.R. 761 (H.L.). Appellants claim that no Names have successfully enforced these judgments because the Agents are now insolvent. That the parties most easily sued in England are insolvent is indeed unfortunate. The Lloyd's system met with global disaster in the wake of American asbestos litigation. That misfortune, however, does not commend itself as a reason to open up United States courts for the pursuit of solvent defendants in the plaintiff-friendly environment of California.

Without question, England imposes additional barriers to recovery and will thus not provide deterrence, disclosure, or compensation equal to that provided by the United States securities laws. However, the English regulatory structure and the remedies available in England are not so inadequate that enforcement of the choice-of-forum clause violates public policy. *Cf. Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 952 (1st Cir. 1991) (dismissing a securities case on forum non conveniens grounds even though there may be some differences

between Canadian and American securities laws), *cert. denied*, 502 U.S. 1095 (1992). Though a complex question with respect to the securities laws, English law does adequately protect the interests reflected in the American securities laws for those United States residents who elect to participate in English underwriting agreements.

C. RICO

The majority also remands for a determination whether "the Choice Clauses are reasonable in their impact on the obligations established by RICO." Again, I must respectfully disagree. The record provides sufficient information to determine the adequacy of English remedies for a RICO claim. Although RICO provides treble damages not available in England, the remedies in England are adequate to prevent the fraudulent securities conspiracy alleged here. *See supra* Part II.B.; *cf. Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768-69 (9th Cir. 1991) (holding that RICO claims may be dismissed on forum non conveniens grounds even when they would not be available in the alternative forum). Further, even to suggest that a plaintiff need only plead a cause of action under RICO to invalidate Choice Clauses in freely negotiated contracts defies reason. A party's contractual choices cannot be so easily repudiated by artful pleading.

CONCLUSION

I concur in that part of the majority opinion which affirms the dismissal of the Blue Sky law, common law fraud, and breach of fiduciary claims, and agree with the majority that the clauses were not procured by fraud. However, I would affirm the district court across the board, and therefore I dissent from the reversal and remand.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FILED
MAY 1, 1995
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

ALAN RICHARDS, et al.,	) Case Number 94-1211-IEG
	) (POR)
Plaintiffs,	) ORDER GRANTING
	) DEFENDANTS' MOTION
v.	) TO DISMISS AND
	) DISMISSING PLAINTIFF'S
LLOYD'S OF LONDON, et al.,	) MOTION TO DISQUALIFY
	) DEFENSE COUNSEL AS
	) MOOT
Defendants.	) [DOC. ## 6, 13]
	)

Defendants' motion to dismiss and plaintiffs' motion to disqualify defendants' counsel came on regularly for hearing before the Honorable Irma E. Gonzalez on April 24, 1995. Dean Hansell, Taylor R. Briggs, and Aaron C. Gundzik of LeBoeuf, Lamb, Green & MacRae appeared on behalf of defendants. John H. Stephens and Michael V. Pundeff of Robbins & Keehn appeared on behalf of plaintiffs. Having found defendants' motion to dismiss on the basis of the forum-selection clause dispositive, the Court will not reach plaintiffs' motion to disqualify defendants' counsel.

BACKGROUND

A. The Parties

The five hundred and seventy-four individual plaintiffs are investors in the underwriting syndicates of Lloyd's of London; such investors are known as "Members of Lloyd's" or "Names."

Plaintiffs are divided into two groups: Group I plaintiffs became Names before 1986 and Group II plaintiffs became Names after 1986. [1] One hundred and thirty-two of the plaintiffs are California residents, while the remainder are domiciled elsewhere in the United States. Plaintiffs comprise over twenty percent of a total of 2,500 United States residents who became Names at Lloyd's and who still have open liability at Lloyd's. Overall between 1970 and 1993, some 3,200 United States residents were recruited by Lloyd's to become Names. [2] (Am. Compl. ¶ 90) As a result of their investment as Names, plaintiffs have sustained significant financial losses allegedly as a result of underwriting practices which failed to insure adequately against the risk of such disasters as the Piper Alpha and the Exxon Valdez oil spill and pollution and asbestos liabilities. (Am. Compl. ¶¶ 113-127)

Plaintiffs have named as defendants: Lloyd's of London, the Corporation of Lloyd's, the Society of Lloyd's, and the Council of Lloyd's. Plaintiffs allege that Lloyd's of London as a common enterprise comprised of various different entities is an unincorporated association subject to suit under Federal Rule of Civil Procedure 17(b) [3] and the laws of California. (Am. Compl. ¶¶ 1-2, 89) Defendants Society of Lloyd's, Corporation of Lloyd's, and Council of Lloyd's (the only defendants who

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[1] The list of plaintiffs is too long to be provided here; indeed, even plaintiffs did not include a listing of their names in their amended complaint. The only listing of plaintiffs is in the caption of the amended complaint, which does separately name Group I and II plaintiffs.

[2] "While eighty percent of Lloyd's 26,000 Names are English, about 2,500 representing more than $1 billion in capital, are American." *Roby v. Corporation of Lloyd's,* 996 F.2d 1353, 1357 (2nd Cir.), *cert. denied*, 114 S. Ct. 385 (1993).

[3] Rule 17(b) provides in relevant part: "In all other cases [i.e. where the party is neither an individual nor a corporation] capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States ...."

have accepted service of this action) contest the plaintiff's characterization of Lloyd's as a common enterprise. However, the Court was not fully briefed on this issue nor is a determination of this issue necessary to the resolution of the motion before the Court. For the purposes of this motion, the entities who have appeared will be referred to collectively as "Lloyd's" or "defendants" or individually as the "Society," "Corporation," or "Council."

Plaintiffs state some fifteen claims for relief against defendants alleging that their investment in Lloyd's constitutes the sale of a security, that this sale was accomplished through methods which failed to comply with United States securities laws with respect to both registration and disclosure. Plaintiffs contend that their investments were procured through misrepresentation, fraud, and deceit.

This Court is not the first to entertain claims of Names alleging securities fraud and other misconduct on the part of Lloyd's. [4] Four circuit courts of appeals have issued decisions in suits between the Names and various entities of Lloyd's: *Bonny v. Society of Lloyd's,* 3 F.3d 156 (7th Cir.) (enforcing forum selection and choice of law clauses and dismissing the suit), *cert.* denied, 114 S. Ct. 1059 (1994); [5] *Roby v. Corporation of Lloyd's,* 996 F.2d 1353 (2nd Cir.) (same), *cert. denied*, 114 S. Ct. 384 (1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.) (same), *cert. denied,* 113 S. Ct. 658 (1992); *Hirsch v. Oakeley Vaughan Underwriting, Ltd.*, No. 89-2563, (5th Cir.

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[4] In fact, approximately forty of the plaintiffs in this action were plaintiffs in the *Roby* action. These plaintiffs are identified in the amended complaint by the placement of an asterisk after the plaintiff's name. Other plaintiffs are alleged to have been or to be parties to other actions in the United States and England; however, those suits do not appear to present the same claims stated in the instant action. (Defs.' Mem. at 3-4).

[5] The Seventh Circuit dismissed another suit by a Name against the Corporation of Lloyd's on the basis of the forum selection clause; however, the claims presented by that Name were not securities claims and are factually distinct from the instant claims. *See Hugel v. Corporation of Lloyd's,* 999 F.2d 206 (7th Cir. 1993).

May 31, 1989) (unpub. slip op.) [6] (dismissing Names' action on the basis of forum non conveniens), *cert. denied*, 498 U.S. 981 (1990). In addition, several district courts have been faced with similar issues. *See, e.g., Leslie v. Lloyd's of London*, Civ. No. H-90-1907 (S.D. Tex. Sept. 5, 1991) (wherein the court refused to enforce the choice of forum clause and suit remains pending); *Beauzay v. Corporation of Lloyd's*, Civ. No. C-94-20859 (N.D. Cal.) (wherein plaintiffs dismissed action pursuant to Rule 41(a) after oral argument on several pending motions including defendants' motion to dismiss pursuant to forum-selection clause).

B. The Structure of Lloyd's and Plaintiffs' Relationship Thereto

To understand the claims presented, it is necessary to have a sense of what Lloyd's is and how it is structured. [7] Lloyd's is a market in which more than three hundred Underwriting Agencies compete for underwriting business. The Corporation of Lloyd's, also referred to the Society of Lloyd's, and the Council of Lloyd's were established by the Lloyd's Act of 1871 to 1982. (Defs.' Request for Judicial Notice, Ex. 2.1, at 223) These entities oversee and regulate the competition for underwriting business in the Lloyd's market.

The Corporation of Lloyd's provides administrative support to the other entities; whereas, the Council controls the management and regulation of the affairs of the Society. The council, which is empowered to pass bylaws, promulgates regulations, provides enforcement, and otherwise governs the Underwriting Agencies, the Society, and the Corporation. It

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[6] A copy of the Fifth Circuit's unpublished disposition is attached as exhibit 1.5 to Defendants' Request for Judicial Notice.

[7] The Second and Seventh Circuits have both provided descriptions of Lloyd's from which this Court will borrow. *See Roby*, 996 F.2d at 1357-1358; *Bonny*, 3 F.3d at 158-159. Plaintiffs contend that these decisions do not accurately describe the structure of Lloyd's; however, the Court finds this issue not directly material to its decision and further that plaintiffs have failed to persuade this Court that those descriptions are sufficiently erroneous to require the Court to disregard them.

should be noted that the Corporation, Society, and Council do not actually underwrite risks, accept premiums, or insure risks; these entities do not share in any way in the profits or losses from the underwriting of risks. [8] Rather, Underwriting Agencies, or syndicates, [9] compete for the insurance business. The Underwriting Agencies are comprised of corporations and partnerships, and each is controlled by a Managing Agent who is responsible for the financial status of its agency. The Managing Agent must attract not only underwriting business from brokers but also the capital with which to insure the risks underwritten.

Underwriting capital is obtained from the Names. Names become Members of the Society of Lloyd's through a series of agreements, a proof of financial means, [10] and the deposit of an irrevocable letter of credit in favor of Lloyd's. Two of the agreements into which an individual must enter to become a Member are the General Undertaking and the Members' Agent Agreement. The General Agreement is between the Name and the Lloyd's governing bodies and since 1986 has contained choice of forum and choice of law clauses (collectively referred to as the "choice clauses") selecting England for both purposes. [11] For the Group I plaintiffs, who were Members of Lloyd's

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[8] Lloyd's obtains the funds necessary to conduct its business through assessments on its Members and membership fees.

[9] Most underwriting syndicates specialize in a particular type of insurance.

[10] Names must pass a "means test," which as of 1988 required prospective Names to maintain a net worth of approximately $170,000. *Roby*, 996 F.2d at 1357.

[11] The General Undertaking provides in relevant part:

> 2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.
>
> 2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's

(footnote continues)

before 1986, the 1986 Form General Undertaking represented a change in an already existing relationship; whereas, the Group II plaintiffs, who began investing after 1986, have only been party to the 1986 Form General Undertaking. [12] The Members' Agent's Agreement is between a Name and his or her Members' Agent and also contains choice of law, choice of forum, and arbitration clauses in favor of England.

By becoming a Member, Names obtain the right to participate in the Lloyd's Underwriting Agencies; the Managing Agent of each Underwriting Agency owes its Names a contractual duty to manage the agency with reasonable care and skill. However, Names do not deal directly with Lloyd's or the Managing Agents but are represented by Members' Agents. Pursuant to the Members' Agent's Agreement, Members' Agents stand in a fiduciary relationship with their Names and owe a duty to act in the sole interest of their principal Names.

Upon becoming a Name, an individual decides how much to invest and selects which syndicates in which to participate. In making these decisions, the individual must rely to a great extent on the advice of his or her Member's Agent. Names generally join more than one underwriting agency in order to spread their risks across different types of insurance. When a

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(footnote continued)

> membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arising out of or relating to such matters shall be brought in such courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause 2 and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceeding brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.

(Am. Compl., Ex. 1)

[12] The Group I plaintiffs contend that the change in the Undertaking was a deliberate attempt by Lloyd's to foreclose certain liabilities already in existence under federal securities laws. *See* discussion *infra*.

Name undertakes an underwriting obligation, that Name is responsible only for his or her share of an agency's losses; however, the Name's liability is **unlimited** for that share.

C. Plaintiffs, Claims

Plaintiffs' complaint essentially seeks to redress the severe financial losses they have incurred as a result of their underwriting of risks with Lloyd's. [13] Plaintiffs claim that Lloyd's actively sought the investment of United States residents to fill an "urgent need" to build up capital. Plaintiffs contend that this solicitation and their ultimate investment constituted the sale of securities. Plaintiffs further contend that information known to persons and entities at Lloyd's regarding the possible consequences of the risks undertaken was withheld and that the U.S. Names were deliberately and disproportionately exposed to massive liabilities for which certain entities and persons at Lloyd's knew there was insufficient underwriting capital or reinsurance.

Plaintiffs state fifteen claims against defendants. Twelve of plaintiffs' claims seek damages or rescission under federal securities laws, state securities laws, RICO, and state common law torts. Another claim seeks injunctive relief. Finally, plaintiffs state two claims for declaratory relief. The first seeks a declaration of this Court that the choice clauses of the 1986 Form General Undertaking are void and unenforceable as a result of fraud and overreaching by Lloyd's. The second seeks a declaration of the Court that the choice clauses in the 1986 Form General Undertaking are void and enforceable because they violate the public policy codified in the anti-waiver provisions of federal securities laws.

DISCUSSION

Two motions are now pending before this Court. Defendants move for dismissal of plaintiffs' complaint on the

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[13] Plaintiffs' amended complaint is 110 pages and sets forth fifteen claims for relief; only a bare outline will be provided herein.

grounds that (1) the forum-selection clause selecting England is binding and therefore venue in this Court is improper; or (2) that dismissal is appropriate under the doctrine of forum non conveniens. Plaintiffs move for the disqualification of counsel for defendants on the grounds of conflict of interest. Because the first ground of the defendants' motion is dispositive, the Court will not reach the other issues raised by the parties.

A. Standard of Review

The parties disagree about what rule should be applied to a motion to dismiss on the basis of a forum-selection clause. citing several cases outside the Ninth Circuit, plaintiffs suggest that the proper standard is that used for a Rule 12(b)(6) motion, in which the allegations in the complaint must be accepted as true and construed in the light most favorable to plaintiff.[14] Defendants contend that there is no consensus among the courts, but in no event should the allegations of the complaint be accepted as true.[15]

In cases analyzing the application of forum-selection clauses, the Ninth Circuit has yet to find any particular Rule of Federal Civil Procedure necessary to decision of the issue. *Cf. Spradlin v. Lear Seigler Management Services,* 926 F.2d 856 (9th Cir. 1991) (affirming a dismissal on the basis of a forum-selection clause under Rule 12(b)(3) without discussing the applicability of the rule). *See also, Riley,* 969 F.2d at 956 (stating that a motion to dismiss based on a forum-selection clause is

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[14] Such a standard would be particularly advantageous for plaintiffs. Plaintiffs obviously anticipated defendants' motion prior to the filing of their complaint and have affirmatively pleaded that the forum selection clause was the result of fraud and overreaching and violates public policy and is therefore unenforceable.

[15] Even if a Rule 12(b)(6) standard were to be applied, the Court would be required to accept as true and construe in favor of plaintiffs only the facts pled by plaintiffs. The Court would not be required to accord any deference to the legal conclusions set forth in plaintiffs' complaint.

properly analyzed as a motion to dismiss for improper venue under Rule 12(b)(3) and citing *Spradlin* as authority therefor).

The Court finds that although no Rule of Civil Procedure has been uniformly applied to the disposition of such motions, the Supreme Court has, in a series of four cases, enunciated the applicable standards. *See Carnival Cruise Line v. Shute,* 499 U.S. 585 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.,* 473 U.S. 614 (1985); *Scherk v. Alberto-Culver Co.,* 417 U.S. 506 (1974);[16] *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972).

Forum-selection clauses are presumptively valid. *See, e.g., Shute,* 499 U.S. at 589 (stating that forum-selection clauses are prima facie valid); *accord The Bremen,* 407 U.S. at 9-10, 15. Such clauses have particular force in the context of international transactions:

> Even before *Scherk,* this Court had recognized the utility of forum-selection clauses in international transactions.... "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."

Mitsubishi, 473 U.S. at 629 (quoting *The Bremen,* 407 U.S. at 9).[17]

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[16] In both *Scherk* and *Mitsubishi,* arbitration clauses were at issue. But the Court in *Scherk* said, "An agreement to arbitrate before a specialized tribunal is in effect a specialized kind of forum-selection clause." 473 U.S. at 630.

[17] The parties disagree about the extent to which the relationship between the Names and Lloyd's is international. Plaintiffs point out that numerous Names were recruited by agents in the United States and permitted to execute all of their documents in the United States. However all plaintiffs were clearly aware that they were dealing with an English organization, that the actual underwriting occurred in England, and that their Members' Agents, with

(footnote continues)

The presumption of validity may be overcome only by a clear or strong showing that the clause is "unreasonable" under the circumstances. *The Bremen*, 407 U.S. at 10, 15. As recently summarized by the Second Circuit:

> The Supreme Court has construed this exception narrowly: forum selection and choice of law clauses are "unreasonable" (1) if their incorporation into the agreement was the result of fraud or overreaching,... (2) if the complaining party "will for all practical purposes be deprived of his day in court," due to grave inconvenience or unfairness of the selected forum; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy, or (4) if the clauses contravene a strong public policy of the forum state.

Roby, 996 F.2d at 1363 (internal citations omitted).

Therefore, the Court will examine whether under any of these four factors plaintiffs have made the necessary strong and clear showing that the forum-selection clause is unreasonable under the circumstances. Plaintiffs do not present arguments under the four factors as such, rather they assert six "considerations" which they contend come within one or more of the four factors set forth in Roby above. Plaintiffs' considerations are overreaching per se, overreaching, fraudulent scheme, fraudulent inducement, adhesion contract, and choice clauses as independent contractual provisions. Plaintiffs also make a seventh argument that the choice clauses violate a strong public policy and are therefore void. None of plaintiffs, considerations raise the inconvenience of the forum as a grounds for non-enforcement, so it will not be considered.

(footnote continued)

whom they principally dealt, were located in and worked from England. Therefore, the Court finds that the Names' relationship with Lloyd's is most definitely international in character.

B. Analysis

Before addressing plaintiffs' considerations, the Court notes that both parties, but particularly plaintiffs, have submitted an overwhelming number of documents with respect to this motion. Plaintiffs' submitted thousands of pages of declarations and exhibits, many of which bear solely upon the merit of the substantive causes of action in this suit. The Court is not clear why plaintiffs found it necessary to submit so much material that seemingly has no relevance to the instant motion.

Defendants submitted two requests for judicial notice which are pertinent to this motion. (*See* Defs.' First and Second Requests for Judicial Notice) By these requests, defendants request that this Court take judicial notice of certain pleadings, orders, and statutes from other jurisdictions (including foreign jurisdictions). (*See id.* (listing all items)) In that all of the documents submitted are public records and capable of accurate and ready confirmation by sources that cannot reasonably be questioned, the Court grants defendants' First and Second Requests for Judicial Notice.

Plaintiffs also submitted a request for judicial notice in connection with this motion, seeking judicial notice of several documents from a case in the Southern District of Texas as well as a duplicative request for something submitted by defendants. (*See* Pls.' Request for Judicial Notice) For the same reasons set forth with respect to defendants' requests, plaintiffs' request is granted.

At the outset, the Court notes that the 1986 Form General Undertaking had a slightly different significance for the Group I plaintiffs than it did for the Group II plaintiffs. Group I plaintiffs were Names under an earlier General Undertaking that did not include choice clauses. The new form was presented to them as necessary in order to continue investing in Lloyd's. In contrast, Group II Names did not begin investing until the new form was instituted; therefore, these Names have always been subject to the choice clauses.

1. Overreaching Per Se

Plaintiffs claim that the very submission of the 1986 Form General Undertaking to the Names for signature constituted a violation of sections 17(a)(2) and 12(2) of the 1933 Securities Act, because no one at Lloyd's disclosed to the Names the massive liabilities they were facing. [18] As plaintiffs argument goes, because the Undertaking itself violated federal securities laws and because defendants failed to explain that the Names were forgoing their opportunity to sue on the basis of those violations by signing the Undertaking, the Undertaking constitutes overreaching per se. (*See* Pls.' Opp. at 19-22) Plaintiffs' circular argument assumes too much and proves too little.

At the time the General Undertaking was presented to Names for signature and still today, the Securities and Exchange Commission ("SEC") does not require Lloyd's to comply with United States securities laws. Nor have plaintiffs presented this Court with any caselaw that has required Lloyd's to do so or penalized it for not doing so. Therefore, the conclusion that the Undertaking itself violated federal securities laws is one that is far from settled and pertains to the substantive claims asserted by plaintiffs not the forum-selection clause.

In any event, plaintiffs' argument stripped to its essence is that the forum-selection clause deprives them of remedies that would be available in the United States. This contention is distinct from a claim of overreaching. A party to a contract has an obligation to read its provisions, is presumed to know its terms, and consents to be bound by them. *Bonny*, 3 F.3d at 160 n.10. The mere fact that plaintiffs did not appreciate the consequences of an English forum does not "clearly show" overreaching and is most certainly not "overreaching per se." As recognized by the Supreme Court,

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[18] *See* Declaration of Robert J. Haft.

> [U]ncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

Scherk, 417 U.S. at 516.

2. Overreaching

Plaintiffs' overreaching consideration again focuses on the differences between the law of the English forum and the law of the United States. The Court finds that the differences between the law of these two jurisdictions does not give rise to a claim for overreaching. The fact that Lloyd's did not provide Names with an explanation of English law along with the 1986 Form General Undertaking does not mean that Lloyd's was exerting undue influence or unequal bargaining power, or overreaching.

Plaintiffs appear to assert that defendants had some duty, fiduciary or otherwise, to explain the Undertaking and its choice clauses to them. The General Undertaking is the agreement between the Society of Lloyd's and the individual Name. Plaintiffs' own expert concluded that the Society owed plaintiffs no fiduciary duty. (Rokison Decl. ¶¶ 25-31) Therefore, the Court finds the Society had no affirmative duty to disclose to the Names all potential ramifications of the choice clauses.

Further, it appears that plaintiffs have merely recycled, as a claim for overreaching, arguments presented to and rejected by the *Riley, Roby*, and *Bonny* courts that the remedies under English law are insufficient to vindicate plaintiffs substantive rights. *See Bonny*, 3 F.3d at 161-162 (stating that the remedies available in the English forum are sufficient not only to provide damages to plaintiffs but also to deter the exploitation of United States investors); *Roby*, 996 F.2d at 1365 (stating that

several adequate remedies exist under English law and that the policies of ensuring full and fair disclosure to United States investors have not been subverted).

3. Fraudulent Scheme

Plaintiffs allege that the forum selection and choice of law clauses were the "capper" to Lloyd's ongoing fraudulent scheme to insulate themselves from actions based on their fraud in soliciting capital from the United States names; therefore, the forum-selection clause should not be enforced and the issue of this fraudulent scheme should proceed to trial, *citing Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963). See Am. Compl. ¶¶ 211-213. [19]

In *Moseley*, the issue was whether a subcontractor could recover compensation allegedly due under two subcontracts with the contractor. The subcontractor sought damages and rescission based on the contractor's alleged fraud. *Id.* at 168. The subcontracts contained arbitration clauses; however, "neither party sought to compel specific performance of the arbitration agreement." *Id.* at 170. The Court concluded, under the Miller Act and the Arbitration Act, that the issue of fraud should be adjudicated before the rights of the parties under the subcontracts could be determined. In reaching its conclusion, the Court specifically noted that the parties had not attempted to enforce the arbitration provision of the subcontracts.

In opinions after *Moseley* in which the enforceability of a choice clause was specifically at issue, the Supreme Court has stated that although a forum-selection clause induced by fraud is not enforceable,

> This qualification ... means that a [ ] ... forum-selection clause in a contract is not enforceable if the **inclusion of**

[19] Although plaintiffs detail their allegations in the complaint, plaintiffs point to no proof of their allegations. (*See* Pls.' Opp. at 26-7)

> **that clause in the contract** was the product of fraud or coercion.

Scherk, 417 U.S. at 519 n.14. *See also, Prima Paint Corp v. Flood & Conklin*, 388 U.S. 395, 403-404 (1967) ("[I]f the claim is fraud in the inducement of the arbitration clause itself — an issue which goes to the 'making' of the agreement to arbitrate — the federal court may proceed to adjudicate it [despite the existence of the arbitration clause]."). The Ninth Circuit adopted this position in *Three Valleys Municipal Water District v. E.F. Hutton & Co.*, 925 F.2d 1136, 1139-1140 (9th Cir. 1991), stating that when an arbitration provision exists in a contract, the court must not consider a defense of fraud in the inducement unless it goes directly to the arbitration clause. Otherwise, such a determination is left for arbitration. *Id.*

In a factual context very similar to the case at bar, the *Riley* court required not only that the party opposing the choice clauses allege fraud in the procurement of those specific provisions but also that any such allegation be pleaded with particularity under Rule 9(b). *Riley*, 969 F.2d at 960.

Accordingly, the Court holds that the mere allegation of fraud in the inducement of the contract as a whole is not sufficient to support the invalidation of the forum-selection clause. Rather, there must be some evidence to support the allegation the forum-selection clause was obtained by fraud. *See Carnival Cruise Lines*, 499 U.S. at 595. Here, plaintiffs' opposition cites no evidence supporting the contention that the forum-selection clause was an **intended** part of a scheme to defraud the Names. [20] Nor is any evidence presented that any person at

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[20] Plaintiffs' volumes of evidence contain numerous documents attesting to the fact that certain persons or entities of Lloyd's or syndicates competing at Lloyd's were aware of the massive liabilities facing Names participating in overexposed, undercapitalized, and underinsured syndicates. However, plaintiffs did not bring this Court's attention to any documents that tended to show, with particularity, that the Lloyd's 1986 Form General Undertaking was

(footnote continues)

Lloyd's made affirmative misrepresentations about the General [21] Undertaking or it legal effect to gain the Names, accession to it. Furthermore, the Court finds that plaintiffs' evidence of a fraudulent scheme with respect to Lloyd's as a whole is not sufficient to meet plaintiffs' burden in setting aside the forum-selection clause.

4. Fraudulent Inducement

Plaintiffs allege that defendants' failure to disclose adequately the risks of their investment and to disclose the ramifications of the choice clauses amounts to fraudulent inducement. Plaintiffs argue that had they been aware of either or both, they would not have agreed to the imposition of the choice clauses. Again, the Court reiterates that defendants had no duty to explain English law to plaintiffs. Nondisclosure does not rise to the level of fraudulent concealment. Furthermore, although plaintiffs allege that defendants "concealed" the effects of the choice clauses, plaintiffs point to no evidence supporting that a Name inquired of the defendants about the effect of the new Undertaking or the choice clauses and was denied information.

5. Adhesion Contract

Plaintiffs contend that the 1986 Form General Undertaking was an adhesion contract. Plaintiffs' arguments appear to focus on the predicament of the Group I plaintiffs upon receipt

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(footnote continued)

specifically designed to disable Names from pursuing legitimate causes of action.

[21] The seven individual plaintiffs' declarations attached to Michael Pundeff's declaration do not in fact bear out his claim that they "evidenc[e] the misrepresentations made in connection with the presentment of the 1986 General Undertaking...." The Court has reviewed these declarations and finds that none actually asserts affirmative misrepresentations about the choice clauses.

of the new Undertaking which represented a change to an ongoing relationship.

First, several plaintiffs provide declarations stating that they did not receive the Undertaking until sometime between June and November of 1986. At that point, Members' Agents were already designating syndicates for the 1987 underwriting year. (*See* Pundeff Decl., vol. 2, Tab C (seven individual plaintiffs' declarations)). Plaintiffs imply that they had no "choice" about whether or not to continue underwriting. None of these plaintiffs detail what penalty, if any, he or she would have suffered had he or she merely refused to sign the agreement. The Court notes, further, that the new Undertaking required to be signed did not take effect until January 1, 1987. Until that point, plaintiffs former Undertaking was binding. No Name has indicated that he or she did not receive at least some notice of the Undertaking and its provisions before it was to take effect.

Second, several plaintiffs state that at the point at which they signed the Undertaking they would have suffered cancellation fees if they refused. (*See id.* at Tab D (thirteen individual plaintiffs' declarations)) For example, Martha Fogelman would have suffered a cancellation fee of £3,500; Gerald Hamburg would have suffered a cancellation fee of £8,000. However, the Court must look at these cancellation fees in light of the investments these persons were making. For example, Martha Fogelman's underwriting investment required her to provide Lloyd's with collateral in the amount of £210,000; Gerald Hamburg's required collateral was £350,000. Compared to plaintiffs' investments with Lloyd's, the relatively minimal cancellation fee does not appear coercive.

Plaintiffs also contend that their collateral might have remained tied up for a year or two or possibly more. However, as the Court understands the relationship between a Name and Lloyd's, any time a Name discontinues investing his or her capital is liable to remain tied up until the syndicate closes off or reinsures the risk. Finally, plaintiffs contend that they would

have forfeited all of their costs incurred in becoming members. Again, the Court finds that relative to Names' investment in and profit from Lloyd's this amount is not coercive.

The potential consequences of refusing to sign the new Undertaking did not create significant inequality of bargaining power between the Names and Lloyd's. The evidence presented by plaintiffs is not sufficient to make a clear showing of adhesion.

6. Choice Clauses as Independent Contractual Provisions

The Group I plaintiffs assert that because the only substantive change between the former undertaking and the 1986 Form was the inclusion of the choice clauses, any fraud going to the contract as a whole bears solely on the those choice clauses. (Pls.' Opp. at 29-30; Am. Compl. ¶¶ 222-224). Because the Court has hot found any fraud with respect to the contract as a whole, this sixth consideration appears meritless. If plaintiffs are attempting to argue that because the only substantive change was the inclusion of the clauses those clauses must be fraudulent, the Court flatly rejects any such attempted inference.

For the foregoing reasons, the Court finds that none of plaintiffs' six considerations meets the "heavy burden" plaintiffs bear of showing a forum-selection clause "unreasonable" under the circumstances.

7. Whether the Choice Clauses Violate a Strong Public Policy

The final ground plaintiffs assert for setting aside the forum-selection clause is that the choice clauses operate as prospective waiver of their rights under the United States securities laws and thus violate a strong public policy. This contention was squarely presented and ultimately rejected by the

Second Circuit in *Roby*. [22] See 996 F.2d at 1363-1366. In reaching its conclusion, the Second Circuit stated:

> We believe that if the Roby Names were able to show that available remedies in England are insufficient to deter British issuers from exploiting American investors through fraud, misrepresentation, or inadequate disclosure, we would not hesitate to condemn the choice of law, forum selection, and arbitration clauses as against public policy.

Id. at 1365.

Relying on this language, plaintiffs urge this Court to reach a different conclusion from the *Roby* court. Plaintiffs contend that the Second Circuit anchored its decision on two incorrect assumptions regarding: (1) the SEC's position with respect to the applicability of the U.S. securities laws to Lloyd's, and (2) the efficacy of English law to provide a sufficient deterrent to exploitation of U.S. investors.

The Second Circuit made the following statements regarding the SEC:

> We believe that [the public] policy concern is somewhat diluted because the SEC consistently has exempted Lloyd's from the registration requirements of the securities laws. Apparently the SEC has decided that the Lloyd's' means test meets the requirements of Regulation D. We are extremely reluctant to dispute the SEC's apparent judgment that the Roby Names are sophisticated enough that they do not heed the disclosure protections of the securities laws.

Id. at 1365-1366. Plaintiffs submit Eugene Goldman's declaration and the accompanying letters to controvert the Second Circuit's assumptions. These documents make clear that the

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[22] The Seventh Circuit also addressed this argument and rejected it. *See Bonny*, 3 F.3d at 161 (citing *Roby*).

SEC has never **affirmatively** exempted Lloyd's from registration, issued it an official "no action" letter regarding its practices, or made any other affirmative public determinations regarding the applicability of federal securities laws to Lloyd's. However, none of plaintiffs' documents negate the fact that the SEC has never publicly taken any action to enforce federal securities laws against Lloyd's, despite the fact that the SEC has at various times and by various persons been apprised of Lloyd's practices and of some of the allegations against Lloyd's.

While the inferences drawn by the *Roby* court from the SEC's inaction may appear somewhat overstated, the Court does not find plaintiffs' evidence sufficient to controvert the conclusion of the Second Circuit that the SEC's inaction undercuts or dilutes the strength of the policy argument that insufficient deterrence exists for Lloyd's with respect to adequate disclosure under English law.

With respect to plaintiffs' second contention, the Court declines to address again the issue regarding the adequacy of the remedies available in England. The circuit courts, particularly the Second Circuit, that have addressed this issue have adequately resolved it. The Court has reviewed the experts' declarations regarding the remedies available under English law and finds nothing therein that compels departure from the well-reasoned decisions of the *Roby* and *Bonny* courts. While the remedies available in England may not be the preferred remedies of plaintiffs, that is not a sufficient basis upon which to invalidate the choice clauses.

C. Conclusion

The Court finds that plaintiffs have not shown the existence of any of the four factors meriting invalidation of the forum selection clause. Therefore, the Court finds the forum-selection clause enforceable and plaintiffs' complaint is **DISMISSED**.

The motion to dismiss on the grounds of forum non conveniens and plaintiffs' motion to disqualify defense counsel are dismissed as MOOT.

IT IS SO ORDERED.

Dated: 4/28/95

/S/ IRMA E. GONZALEZ

IRMA E. GONZALEZ
United States District Judge

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APPENDIX E

FILED AUG 4, 1995
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY /S/ CGOBB DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALAN RICHARDS, et al.,	) Case Number 94-1211-IEG
	) (POR)
Plaintiffs,	) ORDER DENYING
	) PLAINTIFFS' MOTION
v.	) FOR RELIEF FROM
	) ORDER;
	) RECONSIDERING
LLOYD'S OF LONDON, et al.,	) AND DENYING
	) PLAINTIFFS' MOTION
Defendants.	) TO DISQUALIFY
	) DEFENDANTS'
	) COUNSEL;
	DENYING AS MOOT
	PLAINTIFFS' MOTION
	FOR ENTRY OF DEFAULT
	[DOC. ## 105, 104]

By order filed May 1, 1995, the Court dismissed plaintiffs' complaint against Lloyd's of London, the Corporation of Lloyd's, the Society of Lloyd's, and the Council of Lloyd's on the grounds that the forum selection clause in the 1986 Form General Undertaking was binding on plaintiffs and required any legal action to be brought in England. (*See* Order Granting Defendants' Motion to Dismiss and Dismissing Plaintiff's Motion to Disqualify Defense Counsel as Moot, filed May 1, 1995 [hereinafter "Dismissal Order"].)

Plaintiffs now move for relief from the Dismissal Order. Plaintiffs have also moved for an order directing

the clerk to enter default against defendant Lloyd's of London, an unincorporated association.

PLAINTIFFS' MOTION FOR RELIEF FROM DISMISSAL ORDER

On May 10, 1995, plaintiffs noticed and served a motion for relief from order. While the memorandum of points and authorities does not discuss the applicable Federal Rule of Civil Procedure or standard to be applied, plaintiffs' notice of motion states that it is based on Federal Rule of Procedure 60(b) and the supplemental declaration of Kenneth Stuart Rokison, plaintiffs' expert on English law. In addition to the new evidence, plaintiffs asserted that (1) plaintiffs were not given an adequate opportunity to respond to defendants opposition; (2) nondisclosure fraud is actionable in the United States and not in England; (3) that the court erroneously distinguished *Moseley v. Electronic Missile Facilities, Inc.*, 374 U.S. 167 (1963); and (4) the disqualification motion should have been decided prior to ruling on the motion to dismiss.

On July 12, 1995, plaintiffs filed a revised memorandum of points and authorities in support of this motion. This revised memorandum raised new arguments and submitted more "new" evidence.[1]

Although plaintiffs' filed and served their motion for relief from order within the ten-day time limit for motions made under Rule 59(e), plaintiffs' notice of motion invoked Rule 60(b) rather than Rule 59. In addition, plaintiffs subsequently filed and served a revised memorandum of points

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[1] "Financial Services Regulation: Self-Regulation at Lloyd's of London," dated May 17, 1995, the Report of the Treasury and Civil Service Committee of England's House of Commons (Fifth Report, Session 1994-95) [hereinafter "Treasury Report"] and Report on Examination of Lloyd's, London as of December 31, 1989, which was prepared pursuant to New York Insurance Law. Plaintiffs request that judicial notice be taken of these documents pursuant to Federal Rule of Evidence 201. That request is granted.

and authorities. This "revision" was more than double the length of the original memorandum, included new legal arguments, and attached more "newly discovered" evidence. Given that plaintiffs invoked Rule 60(b) and presented new arguments and evidence after the ten-day period,[2] the Court construes plaintiffs' motion as seeking relief under Rule 60(b).

"Rule 60(b) 'provides for reconsideration only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief." *School District No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (quoting *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th cir. 1991)). Whether or not to reconsider a final order is left to the discretion of the district court. *Pacific Group v. First State Ins. Co.*, 841 F. Supp. 922, 932 (N.D. Cal. 1993) *rev'd on other grounds*, slip op. (9th Cir. July 28, 1995). To succeed on a motion to reconsider, the moving party must provide the court with "strongly convincing" facts or law in support of reconsideration. *Id.* at 933.

The Court will now consider plaintiffs' arguments for reconsideration, addressing first the question of the disqualification of defendants' counsel.

I. Motion to Disqualify Defendants' Counsel

[Court's discussion and holding omitted]

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[2] The Court finds that it is inappropriate to allow a party to expand the ten-day period under Rule 59 by filing a motion which that party later substantially revises and supplements.

II. Whether Reconsideration Is Warranted on Other Grounds

Plaintiffs seek relief from the Dismissal Order on several other grounds. The Court will now address these arguments.

A. Whether the Briefing Unfairly Prejudiced Plaintiffs

Plaintiffs contend that they were given an Inadequate opportunity to respond to defendants' reply brief. The Court finds this argument without merit and will not reconsider the Dismissal Order on this basis. Defendants were permitted an extended reply, over plaintiffs' contemporaneous opposition, because plaintiffs submitted a thirty-five page opposition with over one hundred and fifty footnotes and three boxes full of supporting documents. The Court was well within its discretion in permitting defendants twenty pages to respond to this evidence, and furthermore, the Court finds plaintiffs suffered no prejudice.

B. Whether the Court Erroneously Distinguished *Moseley*

This argument suggests that the Court erred in its analysis of *Moseley*; such an argument of legal error is appropriately made to the appellate court. The Court has reviewed plaintiffs' arguments regarding *Moseley* and concludes that it will not reconsider its analysis.

C. Plaintiffs' Contentions Regarding Nondisclosure Fraud

Plaintiffs argue that the Court misunderstood the import of plaintiffs' previously submitted evidence when it found the fact that certain persons at Lloyd's may not have disclosed information regarding the potential liabilities faced by Names before requiring the 1986 Form General Undertaking to be signed insufficient to invalidate the Choice Clauses contained therein. The Court understood that plaintiffs were claiming that persons at Lloyd's were engaged in defrauding the Names, and that this fraud was sufficiently pervasive to invalidate the

Choice Clauses. However, the Court was not persuaded by plaintiffs' arguments.

When the Court addressed plaintiffs' arguments regarding overreaching per se, overreaching, fraudulent inducement, and fraudulent scheme (Dismissal Order at p. 14-20), it answered these claims. The Court found that the evidence of withholding of information regarding investment risks not did not lead to the conclusion that plaintiffs were defrauded into the forum selection clause. The fact that plaintiffs' have now focused their arguments on nondisclosure fraud as distinguished from securities violations does not warrant reconsideration.

After reviewing plaintiffs' newly discovered evidence, the Court finds that it does not persuade the Court to alter its decision either. While Rokison's supplemental declaration may clarify certain fine points, the substance of his supplemental declaration was presented with and argued forcefully in the motion. With respect to the other two documents submitted by plaintiffs, the Court finds neither would have altered the outcome of the motion. Neither provides any more evidence tending to suggest that plaintiffs were defrauded into accepting the Choice Clauses. While plaintiffs' contend that the Treasury Report establishes conclusively that Lloyd's acted fraudulently with respect to the Names, the Court finds the Treasury Report more equivocal. Furthermore, the Court finds that even if the report does establish that some fraudulent acts by certain Members' or Managing Agents occurred, that alone would not be sufficient to show that the Choice Clauses in the 1986 Form General Undertaking were induced or procured by fraud.

While the Court appreciates that plaintiffs profoundly disagree with the Dismissal Order, the Court finds no basis before it justifying reconsideration of that order. Accordingly, plaintiffs' motion for relief from order is **DENIED.**

PLAINTIFFS' MOTION FOR ORDER DIRECTING CLERK TO ENTER DEFAULT AGAINST LLOYD'S OF LONDON

Plaintiffs move for an order directing the Clerk of the Court to enter default against Lloyd's of London, an unincorporated association. Plaintiffs claim to have effected service upon this unincorporated association, and it never answered or appeared in this matter on that basis, plaintiffs filed an application for entry of default on March 27, 1995, but default was not entered. Plaintiffs claim that this was a clerical error and that they are entitled to entry of default against Lloyd's of London. Defendants contest whether, in fact, service has been effected upon Lloyd's of London; however, the Court notes that defendants did not move to quash service.

At the time plaintiffs applied for entry of default, the motion to dismiss brought by defendants Corporation of Lloyd's, Society of Lloyd's, and Council of Lloyd's was pending before this Court. The Clerk's Office may have understood this motion as also pertaining to Lloyd's of London. Had that been the case, entry of default would have been improper. However, the motion to dismiss was not brought on behalf of Lloyd's of London, thus the entry of default would have been appropriate at that time.

The question before the Court is whether to order the Clerk to enter default. At this time, the Court finds that the issue of default by Lloyd's of London is moot. While the Court's Dismissal Order may not have been explicit on this point, the forum selection clause contained in the 1986 Form General Undertaking [14] is binding on all entities at Lloyd's, including

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[14] The General Undertaking provides in relevant part:

2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

(footnote continues)

Lloyd's of London, an unincorporated association, if such an entity exists. The Dismissal order dismissed plaintiffs' complaint in its entirety and as to all parties. Therefore, the Court **DISMISSES AS MOOT** plaintiffs' motion for order directing Clerk to enter default against Lloyd's of London, an unincorporated association.

CONCLUSION

In summary, the Court has exercised its discretion to reconsider its order dismissing as moot plaintiffs' motion to disqualify defendants' counsel. The Court declined to reconsider its Dismissal Order on any of the other grounds asserted by plaintiffs. After a full consideration of the record, the Court **DENIES** plaintiffs' motion to disqualify defendants' counsel. Therefore, the Court **DENIES** plaintiffs' motion for relief from order.

In addition, the Court **DISMISSES AS MOOT** plaintiffs' motion for order directing the Clerk to enter default against Lloyd's of London, an unincorporated association.

(footnote continued)

2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arising out of or relating to such matters shall be brought in such courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause 2 and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceeding brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.

(Am. Compl., Ex. 1).

Having declined to order relief from the Dismissal Order, plaintiffs' complaint is **DISMISSED IN ITS ENTIRETY** and **AS TO ALL PARTIES.**

IT IS SO ORDERED.

Dated: August 4, 1995

/S/ Irma E. Gonzalez
IRMA E. GONZALES
United States District Judge

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APPENDIX F

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BY DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOHN R. NORTON, III, et al.,	CIVIL NO. 95-0952-IEG (AJB)
Plaintiffs,	
v.	STIPULATION AND ORDER
LLOYD'S OF LONDON, et al.,	
Defendants.	

The parties hereby stipulate that the same Orders and Judgment in Civil Case No. 94-12211 IEG be deemed entered against all plaintiffs in this action to the same effect and on the same grounds as the Court's May 1, 1995, Order Granting Defendants' Motion to Dismiss and Dismissing Plaintiffs' Motion to Disqualify Defense Counsel as Moot and separate Judgment in a Civil Case, and the Court's August 4, 1995, Order Denying Plaintiffs' Motion for Relief from Order; Reconsidering and Denying Plaintiffs' Motion to Disqualify Defendants' Counsel; Denying as Moot Plaintiffs' Motion for Entry of Default in *Richards v. Lloyd's of London*, Cas No. 94-1211-IEG (POR).

The parties further stipulate that said orders shall be appealable Orders in this action on the same basis as in *Richards*; that a notice of appeal may be filed in this action within the 30-day appeal period commencing with the date of entry of this stipulated order; and that this action may be consolidated with *Richards* for purposes of appeal.

The parties further stipulate that all pleadings and other documents filed and all evidentiary materials lodged with the Court in *Richards* shall be deemed filed and lodged, and a part of the record, in this action. The same rulings of the court in *Richards* shall be deemed to have been also made in this action. Each of the "Group I" plaintiffs in this action shall be deemed to have filed a declaration that attests to the same facts set forth in the Declaration of Group I Plaintiff in Opposition to Motion to Dismiss, attached hereto as Exhibit A. Each of the "Group II" plaintiffs in this action shall be deemed to have filed a declaration that attests to the same facts set forth in the Declaration of Group II Plaintiff in Opposition to Motion to Dismiss, attached hereto as Exhibit B.

The parties stipulate that the statutes of limitation for the claims for relief asserted by the *Norton* plaintiffs shall be deemed tolled as of March 17, 1995.

Dated Sept 21, 1995

ROBBINS & KEEHN

By: /s/ A. R. ROBBINS
A. R. Robbins
Attorneys for plaintiffs

Dated: September 21, 1995

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/s/ DEAN HANSELL
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IT IS SO ORDERED.

Dated: 9/24/95

/s/ IRMA E. GONZALEZ
The Honorable Irma E.
Gonzalez
United States District
Court Judge for the
Southern District of
California

APPENDIX G

Disclosure and Anti-fraud Provisions
Securities Act of 1933

Securities Act of 1933, § 5:

Prohibitions relating to interstate commerce and the mails

SALE OR DELIVERY AFTER SALE OF UNREGISTERED SECURITIES

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

NECESSITY OF PROSPECTUS MEETING REQUIREMENTS OF SECTION 77J OF THIS TITLE

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under

this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

NECESSITY OF FILING REGISTRATION STATEMENT

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

15 U.S.C. § 77e

Securities Act of 1933, § 7:

Information Required in Registration Statement

(a) The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents specified in Schedule A, and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B; except that the Commission may by rules or regulations provide that any such information or document need not be included in

respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement. If any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement, If any such person is named as having prepared or certified a report or valuation (other than a public official document or statement) which is used in connection with the registration statement, but is not named as having prepared or certified such report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement unless the Commission dispenses with such filing as impractical or as involving undue hardship on the person filing the registration statement. Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

* * *

15 U.S.C. § 77g

Securities Act of 1933, § 12:

Civil liabilities arising in connection with prospectuses and communications

(a) In general

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b) of this section, to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

* * *

15 U.S.C. § 77l.

APPENDIX H

Anti-fraud Provisions
Securities Act of 1934

Securities Exchange Act of 1934, § 10:

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j.

SEC Rule 10b-5:

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the

circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

APPENDIX I

Controlling Person Liability Provisions
Securities Act of 1933
Securities Exchange Act of 1934

Securities Act of 1933, § 15:

Liability of controlling persons

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77l of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

15 U.S.C. § 77o.

Securities Exchange Act of 1934, § 20(a):

Liability of controlling persons and Persons Who Aid and Abet Violations

(a) Joint and several liability; good faith defense. Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

* * *

15 U.S.C. § 78t.

APPENDIX J

Definition of Terms
Securities Act of 1933
Securities Exchange Act of 1934

Securities Act of 1933, § 2:

Definitions

When used in this subchapter, unless the context otherwise requires —

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

* * *

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or

between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

* * *

15 U.S.C. § 77b.

Securities Exchange Act of 1934, § 3:

Definitions and application

(a) Definitions

When used in this chapter, unless the context otherwise requires —

* * *

(10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing;

but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

* * *

(17) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between and foreign country and any State, or between any State and any place or ship outside thereof. The term includes intrastate use of

(A) any facility of a national securities exchange or of a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

* * *

15 U.S.C. § 78c.

APPENDIX K

RICO Civil Remedies Provision

Civil remedies

* * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

* * *

18 U.S.C. § 1964(c).

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 95-55747, 95-56467

ALAN RICHARDS, *et al.*,
Plaintiffs-Appellants,

v.

LLOYD'S OF LONDON, *et al.*,
Defendants-Appellees.

JOHN NORTON, *et al.*,
Plaintiffs-Appellants,

v.

LLOYD'S OF LONDON, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 95-55747, 95-56467

ALAN RICHARDS, *et al.*,
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v.

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JOHN NORTON, *et al.*,
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v.

LLOYD'S OF LONDON, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

STATEMENT OF THE ISSUE PRESENTED

Defendant Lloyd's of London, an English company, is alleged to have violated registration and antifraud provisions of the federal securities laws in soliciting the plaintiff investors in the United States to buy it securities. Notwithstanding antiwaiver provisions of the securities laws that render void any agreement to waive compliance with those laws, the district court dismissed the plaintiffs' federal securities law case on the basis of choice of forum and choice of law provisions in their purchase contracts that, taken together, would require litigation in an English forum under English law and would preclude recovery under the securities laws. The questions presented is:

Whether, when a foreign company has committed violations of the federal securities laws in the United States in selling its securities to American investors, the antiwaiver provisions prohibit a United States court from giving effect to contractual provisions that would preclude the purchasers from obtaining relief under the securities laws in any forum.

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION AND SUMMARY OF ITS POSITION

The Securities and Exchange Commission is the agency principally responsible for the administration and enforcement of the federal securities laws. This case involves the application of provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 that render void any purported waiver of a person's obligation to comply with those laws. These antiwaiver provisions state:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any

provision of this title or of the rules and regulations of the Commission shall be void. [1]

These provisions are essential to the enforcement of the securities laws in that they prevent persons from avoiding their obligations under those laws through the simple expedient of requiring investors to waive their rights under those laws as a condition to engaging in securities transactions.

In this case, the district court upheld the validity of forum selection and choice of law provisions entered into between the plaintiffs and Lloyd's [2] that, taken together, required the plaintiffs, who were solicited in the United States to purchase securities from Lloyd's, to bring any action against Lloyd's in the court of England under English law. The district court upheld these clauses even though it is virtually certain, and other courts have recognized, that the English courts will not entertain the plaintiffs' claims under the federal securities laws. Thus, the district court's decision effectively nullifies the antiwaiver provisions.

The far-reaching effect of the district court's holding is apparent in light of the fact that it must be assumed, for purposes of resolving the issue here, that the defendants committed the alleged securities laws violations. Under the district court's holding, the purchasers would have no remedy under the federal securities laws to compensate them for their losses even if the defendants conceded the violations.

---

[1] The quoted language is from Section 14 of the Securities Act, 15 U.S.C. 77n. The parallel provision in Section 29(a) of the Exchange Act, 15 U.S.C. 78cc(a), is identical in all respect material to this case. The only difference are that the Exchange Act provision (1) is not limited to persons "acquiring any security"; and (2) uses the words "or of any rule or regulation thereunder, or of any rule of an exchange required thereby", instead of the words "or of the rules and regulations of the Commission."

[2] Both Lloyd's of London, an unincorporated association, and the Corporation of Lloyd's, aka the Society of Lloyd's, aka the Society and Council of Lloyd's, have been named as defendants. Together they are referred to herein as "Lloyd's."

The district court's decision follows the approach taken in earlier decision in which the Courts of Appeals for the Second, Seventh and Tenth Circuits upheld substantially identical clauses in agreements entered into between Lloyd's and United States investors. [3] In upholding the contractual choice provisions, the district court and the three courts of appeals primarily relied upon several Supreme Court cases upholding the validity of forum selection clauses that required litigation or arbitration in foreign forums. None of those Supreme Court cases, however, involved choice of law clauses which, if enforced, would deprive the plaintiffs of substantive statutory rights provided in American law. In fact, the Supreme Court made clear in those cases, and in others involving forum selection clauses, that it will not uphold choice clause that result in plaintiffs being deprived of substantive rights. Nothing in those cases allows a United States court to ignore an unambiguous Congressional directive that United States law be available to United States investors.

The district court in this case, and the courts of appeals in the earlier Lloyd's cases, appear to recognize that if these plaintiffs are precluded from pursuing their claims under the federal securities laws, they will only have rights under English law that are more restrictive. The courts nonetheless concluded that the rights available to plaintiffs under English law would be sufficient to meet what they saw as the objectives of United States securities laws. But Congress has made a legislative determination of the obligations and rights that are necessary to protect investors in the United States, and has expressly directed that those protections cannot be waived. The courts cannot substitute their policy views of what laws are sufficient to protect United States investors for the choice made by Congress.

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[3] *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir.), *cert. denied*, 114 S. Ct. 385 (1993); *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1057 (1994); and *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, 506 U.S. 1021 (1992) (the "Lloyd's cases").

The Commission is submitting this brief solely to address the legal issue of the applicability of the antiwaiver provisions, and takes no position on any other issue, including whether the defendants violated the registration and antifraud provision of the securities laws.

The issue addressed is an important one to the enforcement of the federal securities laws. The district court's decision, if upheld, would allow foreign promoters of securities undertaking large scale selling efforts in the United States to avoid private liability under the securities laws simply by requiring the American investors to agree to resolve disputes in a foreign jurisdiction under foreign law, even if the remedies available under the foreign law were far less effective than those available under United States law. Such a holding would seriously impair the ability of defrauded investors to obtain compensation for their losses, and would hamper the deterrent function of the federal securities laws by discouraging private actions. The Commission strongly urges this Court to reverse the district court's erroneous dismissal of this action.

STATEMENT OF THE CASE

A. The Allegations and Factual Background

This is an appeal from the dismissal of an action brought against Lloyd's under the federal securities laws by over 600 residents of the United States. The case arises out of the plaintiffs' investment in the Lloyd's insurance enterprise. The plaintiffs allege that LLoyd's violated the registration requirements of section 5 of the Securities Act, 15 U.S.C. 77e, which is actionable under Section 12(1) of the Act, 15 U.S.C. 77l(1) (ER 4:47). [4] They also seek recover under the antifraud

[4] "ER—:—" refers to the docket number followed by the page number of the Excerpts of Record.

provisions of Section 12(2) of the Securities Act, 15 U.S.C. 77l(2), Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and Commission Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5 (ER 4:47-48). The allegations of fraud include the failure of Lloyd's to disclose the high risks associated with asbestos and other liabilities that had been assumed without adequate reserves by the syndicates in which the United States investors were encouraged to invest (ER 4:91).

As noted in the district court's opinion (ER 102:5-8), Lloyd's differs from a typical United States insurance company in that it does not underwrite insurance, but is composed of individual members, referred to as "Names," who underwrite insurance pursuant to rules and procedures establish by Lloyd's. Each Name must determine the amount of insurance underwriting he wishes to undertake each year, based on the amount of premiums that can be accepted on his behalf. A Name must then put up funds at Lloyd's, typically a letter of credit, to support the chosen level of underwriting. Although a Names limits his risk in the sense of limiting the amount of premiums which can be received during the year, the Name's actual liability is effectively unlimited and may well exceed the amount of the letter of credit.

Individual Names group together annually to form syndicates which act as joint ventures for the Names for the year. This generally enables the Names to spread the risk of any particular underwriting among the various members of the syndicate, each of whom is individually responsible for his or her share of the risk. Each syndicate is managed by a Managing Agent who employs brokers on behalf of the syndicate. The Names are represented by Members' Agents who invite individuals to become Names and who advise their Names on syndicate selection each year.

In order to become a Name an individual must be interviewed by a committee in London. Although each of the United States Names travelled to London before becoming a Name, the solicitation of Americans to become Names and the

alleged misrepresentations concerning the asbestos and other liabilities took place in the United States (ER 4:40-47).

Each Name was required to enter into a General Undertaking with Lloyd's and a Members' Agreement with his or her Members' Agent which contained choice of law clauses providing that the rights and obligations of the parties would be governed by English law and choice of forum clauses providing that the courts of England (or, in the case of the Members' Agent's Agreement, English arbitrators) would have exclusive jurisdiction to resolve any dispute (ER 102:6-7). [5]

B. **The District Court's Decision**

The district court granted the defendants' motion to dismiss. The court held that "[f]orum-selection clauses are presumptively valid," and "[t]he presumption of validity may be overcome only by a clear or strong showing that the clause is 'unreasonable' under the circumstances" (ER 102:11-12). The court adopted the Second Circuit's statement in *Roby* that forum selection and choice of law clauses can only be overcome

> (1) if their incorporation into the agreement was the result of fraud or overreaching, ... (2) if the complaining party "will for all practical purposes be deprived of his day in court," due to grave inconvenience or unfairness of the selected forum, (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy, or (4) if the clauses contravene a strong public policy of the forum state.

---

[5] The General Undertaking with Lloyd's (ER 102:7 n.11) provides that:

> The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

ER 102:12, quoting *Roby*, 996 F.2d at 1363 (internal citations omitted)***

The court concluded that none of these tests had been satisfied. It held that there was no overreaching, that plaintiffs had failed to show fraud in the inducement of the agreement, or that the agreement was a contract of adhesion.

Finally, court considered whether the choice clauses "operate as [a] prospective waiver of their rights under the United States securities laws and this violate a strong public policy" (ER 102:22). The court looked to the *Roby* court's holding that it would only find a violation of public policy if the "Names were able to show that available remedies in England are insufficient to deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure * * * ." *Roby*, 996 F.2d at 1365.

The court held that it would not independently address the issue regarding the adequacy of the remedies available in England. The circuit courts, particularly the Second Circuit, that have addressed this issue have adequately resolved it. The Court has reviewed the experts' declarations regarding the remedies available under English law and finds nothing therein that compels departure from the well-reasoned decisions of the *Roby* and *Bonny* courts.

ER 102:24. The court relied on *Roby* and the Seventh Circuit's decision in *Bonny* to conclude that: "While the remedies available in England may not be the preferred remedies of plaintiffs, that is not a sufficient basis upon which to invalidate the choice clauses." ER 102:24.

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Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding *** arising out of or relating to such matters shall be brought in such courts ***.

The court recognized "that the SEC has never affirmatively exempted Lloyd's from registration, issued it an official 'no action' letter regarding its practices, or made any other affirmative public determinations regarding the applicability of federal securities laws to Lloyd's." ER 102:23. But it went on to conclude that "none of plaintiffs' documents negate the fact that the SEC has never publicly taken any action to enforce federal securities laws against Lloyd's, despite the fact that the SEC has at various times and by various persons been apprised of Lloyd's practices and of some of the allegations against Lloyd's." ER 102:23. The court held that "the SEC's inaction undercuts or dilutes the strength of the policy argument that" only United States law can provide sufficient deterrence (ER 102:24).

ARGUMENT

THE LLOYD'S FORUM SELECTION AND CHOICE OF LAW CLAUSES ARE VOID AND UNENFORCEABLE SINCE THEY OPERATE TO DEPRIVE THE PLAINTIFFS OF SUBSTANTIVE RIGHTS UNDER THE FEDERAL SECURITIES LAWS WHICH CANNOT BE WAIVED.

In upholding the choice of forum and choice of law clauses, the district court failed to give effect to the antiwaiver provisions in the Securities Act and Securities Exchange Act. Although the Supreme Court has held in recent cases that investors can agree to litigate their securities claims in forums other than United States courts, it has stated that securities purchasers cannot waive their substantive rights. Yet that is precisely what has occurred here.

A. The Choice of Forum and Choice of Law Clauses Violate the Antiwaiver Provisions Because Taken Together They Preclude Relief Under the Federal Securities Laws.

At issue here is the effect of two contractual provisions operating in tandem. The first — the choice of forum provision — requires the investors here to litigate claims against Lloyd's

in English courts. The second — the choice of law provision — provides that any dispute arising out of the agreement "shall be governed by and construed in accordance with the laws of England."

The effect of these provisions, taken together, is to preclude investors from obtaining relief under the United States federal securities laws. English conflict of law principles apparently preclude enforcement by an English court of the securities laws where the parties have agreed to the application of English law. The court in *Roby* noted: "According to the undisputed testimony of a British attorney, neither an English court nor an English arbitrator would apply the United States securities laws, because English conflict of law rules do not permit recognition of foreign tort or statutory law." 996 F.2d at 1362. The Rokison Declaration in this case[6] makes it clear that it is "very unlikely" that English courts would find the English choice "avoidable"; that even if it were avoidable it seems "highly likely" that English courts would nevertheless apply English law; and that in applying English law, the English courts will not apply United States legislation, i.e., the securities laws. Rokison Declaration (ER 72:11-13).

The fact that the investors agreed to these provisions is irrelevant, since the very objective of the antiwaiver provisions is to invalidate such agreements. As the Supreme Court held in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 230 (1987), "[t]he voluntariness of the agreement is irrelevant to this inquiry: if a stipulation waives compliance with a statutory duty, it is void under [the antiwaiver provisions], whether voluntary or not."[7]

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[6] Declaration of Kenneth Stuart Rokison in Opposition to Motion to Dismiss (ER 72) ("Rokison Declaration").

[7] *See, e.g., Special Transportation Services, Inc. v. Balto*, 325 F. Supp. 1185 (D. Minn. 1971) (refusing to enforce contractual provisions limiting buyer's remedies for misstatements by seller or securities); *Allied Artists Pictures Corp. v. Giroux*, 312 F. Supp. 450 (S.D.N.Y. 1970) (holding invalid corporation's

(footnote continues)

The fact that the Supreme Court has held that certain choice of forum clauses, standing alone, may not violate the antiwaiver provisions, is likewise not dispositive. In upholding those agreements, the Court was careful to emphasize that the plaintiffs' federal securities law claims could be pursued in the selected forum, and that the choice of forum clause thus did not "weaken [the] ability [of investors] to recover under the [securities laws]" nor deprive investors of an "adequate means of enforcing [those] provisions." *McMahon*, 482 U.S. at 229-30 (United States arbitral forum). Accordingly, those agreements did not "effect[] an impermissible waiver of the substantive projections" of those laws. *Id.* at 229. *See Rodriguez de Ouijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481-482 (1989) (United States arbitral forum).

In this case, in contrast, the requirement that investors litigate in England, coupled with the requirement that they do so under English law, not only "weakens" the investors' ability to recover, but in fact precludes any possibility of recovery under the federal securities laws. These clauses are directly contrary to express statutory prohibitions in the antiwaiver provisions and should be held void.

B. The Supreme Court Cases Relied on by the District Court Upheld Only Choice of Forum Clauses, But Indicated That Clauses Depriving Persons of United States Statutory Rights Would Not be Upheld.

In upholding the choice of forum and choice of law clauses, the district court and other courts have relied on three Supreme Court cases in which the Court upheld international choice of forum provisions. *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) ("[I]n the

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(footnote continued)

agreement to forgo recovery of short-swing profits under Section 16(b) of the Exchange Act). *Cf. Andrews v. Blue*, 489 F.2d 367, 375 (10th Cir. 1973) (plaintiff cannot be estopped from bringing antifraud claims by contractual provisions).

light of present-day commercial realities and expanding international trace we conclude that the forum clause should control absent a strong showing that is should be set aside."); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974) ("[W]e hold that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced ***"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) ("*The Bremen* and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions."). *See also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (domestic choice of forum provision).[8]

Specifically, the courts have looked to the Supreme Court's statement in *The Bremen* that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought." 407 U.S. at 15. They have the looked to whether the Lloyd's clauses would contravene what they term the public policy "incorporated into" the antiwaiver provisions. Concluding that the English courts will provide "sufficient", albeit more restrictive, remedies to investors, the courts have held that United States public policy is not contravened by the choice of forum and choice of law clauses.

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[8] Although the district court (ER 102:12 n.17) concluded that the plaintiffs' "relationship with Lloyd's is most definitely international in character," *see also Riley*, 969 F.2d at 957; *Roby*, 996 F.2d at 1364; *Bonny*, 3 F.3d at 159 n.9, the concerns which those courts have viewed as underlying the Supreme Court international choice of forum cases — that "[f]orum selection and choice of law clauses eliminate uncertainty in international commerce and insure that the parties are not unexpectedly subjected to hostile forums and laws," *Roby*, 996 F.2d at 1363 — are not present here. The Lloyd's defendants can hardly claim surprise that they would be subject to United States law when they came to the United States seeking investment by Americans. There can be no dispute, for example, that they could be subject to law enforcement action by the Commission based on the same conduct alleged in this private action.

The antiwaiver provisions, however, are not simply an expression of public policy that favors United States securities laws unless other comparable laws are available. Rather, they are an express and unequivocal directive that the rights and obligations under the securities laws cannot be waived. This determination has been made by Congress, and the courts are not free to substitute their own public policy determinations.

Nothing in the Supreme Court cases on which the district court and other courts rely allows a United States court to ignore an unambiguous Congressional directive that United States law be available to United States investors. To the contrary, in each of those cases it was assumed for purposes of decision that United States statutory remedies *would* be available. In fact, the Supreme Court has stated that as a matter of public policy, wholly apart from any statutory antiwaiver provision, it would not uphold clauses that deprived persons of United States statutory remedies.

Although the courts of appeals in the earlier Lloyd's cases have characterized the Supreme Court cases as applying to both forum selection and choice of law clauses, [9] those cases in fact only involved choice of forum clauses. *See The Bremen*, 407 U.S. at 15 (upholding provisions in a maritime towage contract that all disputes arising out of performance of the contract would be heard in London); *Scherk*, 417 U.S. at 519-20 (upholding requirement that United States company submit its United States securities law claims to arbitration in a foreign form);

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[9] *See Riley*, 969 F.2d at 957. "When an agreement is truly international, * * * the Supreme Court has quite clearly held that the parties' *choice of law* and forum selection provisions will be given effect."); *Roby*, 996 F.2d at 1362 ("The Supreme Court certainly has indicated that forum selection and *choice of law* clauses are presumptively valid where the underlying transaction is fundamentally international in character."); and *Bonny*, 3 F.3d at 160 ("The Supreme Court has construed [an exception to the presumptive validity of a forum selection clause] narrowly: forum selection and *choice of law* clauses are 'unreasonable' [only if various factors are met]"). (Emphasis added.)

Mitsubishi, 473 U.S. at 640 (compelled arbitration of United States antitrust claims in Japanese forum).

In none of the cases was it understood that the foreign tribunal would fail to apply United States law. To the contrary, in *Mitsubishi* the Court held that a United States court may not compel arbitration if persuaded that a plaintiff would not be able "effectively [to] vindicate its statutory cause of action in the (foreign) arbitral forum." *Mitsubishi*, 473 U.S. at 637. In *Mitsubishi*, the Court stressed that the record establish that the foreign forum *would* entertain the plaintiff's United States antitrust claims: "counsel for [the foreign litigant] conceded that American law applied to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis." *Id.* at 637 n.19.

Likewise, in *Scherk*, the Court specifically noted that the case did not present a situation where an arbitration agreement designating "arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction," since the parties' agreement specified that is would be construed in accordance with Illinois law. See 417 U.S. at 519 n.13. [10] As the Court later explained in *McMahon*, in upholding comparable domestic arbitration agreements:

> The decision in *Scherk* thus turned on the Court's judgment that under the circumstances of that case, arbitration was an adequate substitute for adjudication as a means of enforcing the parties' statutory rights. *Scherk* supports our understanding that *Wilko* [*v. Swan*, 346 U.S. 427 (1953)] must be read as barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights at issue.

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[10] In responding to the argument of the dissent that the Court's decision would "leave American investors at the mercy of multinational corporations," the Court explicitly stated that its decision had "no bearing on the scope of the substantive provisions of the federal securities laws for the simple reason that the question is not presented in this case." *Scherk*, 417 U.S. at 518 n.12.

McMahon, 482 U.S. at 229.

The Supreme Court has, in short, made clear that an agreement to adjudicate a matter in a foreign forum will not be given effect where it will result in plaintiffs forgoing their rights under United States law. This appears to be true even where there is no statutory antiwaiver provision, *see Mitsubishi*, 473 U.S. at 637, but certainly is the case where Congress has expressly forbidden the waiver of the projections of United States law.

The Court recently reiterated its commitment to preventing prospective waivers of statutory rights in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322 (1995), a case involving a foreign arbitration clause in a bill of lading. Under the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1300 *et seq.*, any clause in a bill of lading "lessening [a carrier's] liability" is void. [11] The plaintiff (an insurer that had paid claims arising from the damage to goods during shipment by the defendant carrier) argued that there was no guarantee that the foreign arbitrators would apply COGSA and that the carrier's liability to the cargo owner might be reduced.

The Supreme Court noted that it had not been established what law the foreign arbitrators would apply, and that the district court had retained jurisdiction and would have an opportunity at a later stage to ensure that the plaintiff's legitimate interest in the enforcement of COGSA had been addressed. *Id.* at 2329-30. Quoting *Mitsubishi*, the Court held:

> Were there no subsequent opportunity for review and were we persuaded that "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver

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[11] Section 3(8) of COGSA, 46 U.S.C. § 1303(8), provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties or obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

> of a party's right to pursue statutory remedies * * *, we would have little hesitation in condemning the agreement as against public policy."

Vimar, 115 S.Ct. at 2330 (quoting 473 U.S. at 637 n.19)

The waiver of rights threatened in *Vimar* is precisely what will occur here if the choice clauses are upheld. This Court should not hesitate, therefore, to condemn the Lloyd's choice of forum and choice of law clauses. [12]

C. Even if Public Policy Would Allow Waiving the Protection of United States Securities Laws Where Equivalent Rights and Remedies Are Available Under Foreign Law, Those Protections Are Not Present Here.

1. English Law Does Not Provide Comparable Rights and Remedies to Those Available Under United States Law.

Even if this Court were to conclude that United States law need not be available so long as comparable remedies are available under English law, the English law remedies available to the plaintiffs in this case are not nearly as favorable as their remedies under the federal securities laws.

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[12] In *AVC Nederland B.V. v. Atrium Investment Partnership*, 740 F.2d 148 (2d Cir. 1984), the court incorrectly read *Scherk* to require upholding an agreement to litigate securities claims in the Netherlands *and* to apply the law of the Netherlands. The court held that "*Scherk* read into § 29 of the Securities Exchange Act an exception sufficient to validate arbitration agreements and, by implication, forum-selection and choice-of-law clauses, where the foreign elements of a transaction that comes within the Act are sufficiently meaningful." *Id.* at 160. To the extent such a reading of *Scherk* would require a plaintiff to forgo substantive rights under the federal securities laws, it appears to conflict with the Supreme Court's later reading of *Scherk* in *McMahon*, and its decision in *Mitsubishi* and *Vimar*. Moreover, the "sufficiently meaningful" foreign elements present in *AVC Nederland B.V.* were far greater than those here. As the court explained, the case involved a "dispute among three Dutch businessman arising out of negotiations initiated and concluded in their own country." *Id.* at 156.

English substantive law differs from the federal securities laws in a number of significant respects. *See generally* the Rokison Declaration (ER 72). For example, there is no cause of action under the laws of England for the securities registration violations in the United States. Thus, the effect of the choice of law provision is to forfeit the plaintiffs' express rights to recover for registration violations under Section 12(1) of the Securities Act. *See Bonny*, 3 F.3d at 162.

As to Section 12(2) — which makes persons who sell a security liable for untrue statements, negligent or intentional, made in connection with the sale — the plaintiffs' remedies would be severely compromised. Although English common law, as well as England's Misrepresentations Act, 1967, makes actionable certain types of misrepresentations, including negligent misrepresentations, the protections afforded are not adequate to provide the plaintiffs with remedies equivalent to what they enjoy under United States law. Specifically, Section 14 of the Lloyd's Act, 1982, immunizes Lloyd's from any claims under the Misrepresentations Act, absent a showing of bad faith. [13] Thus, there is no possibility that the plaintiffs could pursue the claims they have alleged against Lloyd's for negligent misrepresentation, such as are available to them under Section 12(2) of the Securities Act.

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[13] Section 14 provides that Lloyd's shall not be liable for damages for negligence or other tort, breach of duty or otherwise, in respect of any exercise of or omission to exercise any power, duty or function conferred or imposed by Lloyd's Acts 1871 to 1982 * * *

(a) in so far as the underwriting business of any member of the Society or the costs of his membership or the costs of his membership or the business of any person as a Lloyd's broker or underwriting agent may be affected;

* * *

unless the act or omission complained of —

(i) was done or omitted to be done in bad faith.

See also Rokison Declaration (ER 72:3-4).

Even as to plaintiff's Section 10(b) and Rule 10b-5 claims, English law is not substantially equivalent. Although the U.K.'s Financial Services Act, 1986, provides private remedies for fraud in connection with securities transactions, Lloyd's enjoys immunity from such liability. [14] In addition, unlike the securities laws, English law does not recognize controlling person liability. *See* Rokison Declaration (ER 72:23-24).

That the remedies available under English law are not as favorable as those available under the federal securities laws has been recognized by each of the courts of appeals in the earlier Lloyd's cases: *Roby*, 996 F.2d at 1366 ("we do not doubt that the United States securities laws would provide the [plaintiffs] with a greater variety of defendants and a greater chance of success due to lighter scienter and causation requirements"); *Bonny*, 3 F.3d at 162 ("It is true that enforcement of the [choice] clauses will deprive plaintiffs of their specific rights under § 12(1) and § 12(2) of the Securities Act of 1933"); and *Riley*, 969 F. 2d at 958 ("The fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement [of the choice clauses]").

2. The Courts Cannot Supplant United States Securities Laws on the View that Foreign Law While Less Protective of Investors, Is Nonetheless "Sufficient."

Rather than looking to whether protections comparable to those under United States securities Laws are available under English law, the courts upholding the choice clauses essentially

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[14] Section 42 of the Financial Services Act exempts "[t]he Society of Lloyd's and persons permitted by the Council of Lloyd's to act as underwriting agents at Lloyd's" from Liability under the Act. See Rokison Declaration (ER 72:4-6).

have tried to discern whether English law is "good enough." In *Roby*, the Second Circuit stated:

> We believe that if the Roby Names were able to show that available remedies in England are insufficient to deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure, we would not hesitate to condemn the choice of law, forum selection and arbitration clauses as against public policy.

Roby, 996 F. 2d at 1365. After examining various remedies available under English law, the court determined that English law was adequate to deter deception of America investors and to induce disclosure of material information. The district court in this case accepted the *Roby* court's conclusion.

The courts upholding the Lloyd's agreement have in essence supplanted their policy views of what laws are sufficient to protect United States investors for the determination made by Congress. In so doing they have overlooked important aspects of the federal securities laws. The district court, like the *Roby* court, erred in giving insufficient weight to the compensatory function of private actions under the securities laws. The court in Roby characterized the purpose of private actions under the securities laws as existing "not because Congress had an overwhelming desire to shift losses after the fact, but rather because private actions provide a potent means of deterring the exploitation of American investors." *Roby*, 996 F.2d at 1364. The court proceeded to examine the deterrent effect of English law, generally ignoring remedies under the securities laws directed at compensating injured investors — remedies that would be lost if English Law were to be applied. Similarly, the court in *Bonny* looked to "policies of insuring full and fair disclosure by issuers and deterring the exploitation of United States investors," finding that the available remedies under English would "suffice to deter deception," even though recognizing that the plaintiffs would be deprived of "their specific rights under § 12(1) and § 12(2) of the Securities Act of

1933." *Bonny*, 3 F.3d at 161-62. This reasoning was expressly adopted by the district court in this case.

Private actions do, of course, serve a useful and necessary function in policing the securities markets, but they also serve as an important means of providing recompense to investors who have been harmed by wrongdoers. The decision below, like the other decisions upholding the clauses, largely eviscerates that latter function of the federal securities laws.

D. The District Court Drew Improper Inferences From the Fact that the Commission Has Not Brought Enforcement Action Against Lloyd's.

Relying in large part on the findings of the *Roby* court, the district court improperly drew an inference from the fact that the Commission has not brought enforcement action against Lloyd's. The court noted that the Second Circuit stated in *Roby*:

> We believe that [the public] policy concern is somewhat diluted because the SEC consistently has exempted Lloyd's from the registration requirements of the securities laws. Apparently the SEC has decided that the Lloyd's' means test meets the requirements of Regulation D [for exemption from registration]. We are extremely reluctant to dispute the SEC's apparent judgment that the Roby Names are sophisticated enough that they do not need the disclosure projections of the securities laws.

ER 102:23 (quoting *Roby*, 996 F.2d at 1365-66). These statements by the *Roby* court were the subject of a letter to counsel for the plaintiffs in this case from the then General Counsel of the Commission, in which he explained that the Commission had not exempted Lloyd's from the registration requirements of the securities laws, and that the Commission's staff had advised Lloyd's that registration would be necessary unless an exemption was available (ER 83: Exhibit 1). He advised that neither the Commission nor the staff had

determined that the Lloyd's' means test met the requirements of Regulation D.

The district court reviewed this evidence, and agreed that the Commission had not exempted Lloyd's, but still found significance in the SEC's inaction:

> However, none of plaintiffs' documents negates the fact that the SEC has never publicly taken any action to enforce federal securities laws against Lloyd's, despite the fact that the SEC has at various times and by various persons been apprised of Lloyd's practices and of some of the allegations against Lloyd's. While the inferences drawn by the *Roby* court from the SEC's inaction may appear somewhat overstated, the Court does not find plaintiffs' evidence sufficient to controvert the conclusion of the Second Circuit that the SEC's inaction undercuts or dilutes the strength of the policy argument that insufficient deterrence exists for Lloyd's with respect to adequate disclosure under English law.
>
> ER 102:23-24. [15]

That statement is inexplicable. This case was dismissed not on the merits but on the basis of choice of forum and choice of law clauses. Yet the district court seems to have concluded that the plaintiffs' ability to sue in the United States is of little policy concern because the case is of little merit. The merit of the case (a matter on which we express no view) is irrelevant at this

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[15] The district court misstated the Commission's position in its finding that:

> At the time the General Undertaking was presented to Names for signature and still today, the Securities and Exchange Commission ("SEC") does not require Lloyd's to comply with United States securities laws.
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> ER 102:15. In fact, the Commission has never exempted Lloyd's from the requirements of the securities laws, nor did it have the statutory authority to do so. The Commission, moreover, does not have to "require" someone to comply with the law; the requirements of the law are, like most laws, self-effecting.

stage. It must be assumed, in the current procedural posture, that the allegations in the complaint of violations are true and can be proved. The question is whether, assuming there has been a violation of the federal securities laws, the plaintiffs can avail themselves of their rights under those laws. Obviously, should it be demonstrated at some point that the plaintiffs' case has not merit, the case can be disposed of on the merits at that time.

Moreover, it is wrong to conclude that because the Commission has not brought action against Lloyd's, a private suit has little merit. The Commission cannot possibly pursue all allegations of wrongdoing, and the Supreme Court repeatedly has recognized that private actions serve as a "necessary supplement" to the Commission's own enforcement activities. *Bateman Eichler, Hill Richards, Inc. v. Berner,* 472 U.S. 299, 310 (1985); *Blue Chips Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975); *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964). For a court to conclude that private litigants may not sue unless the Commission has done so first is wholly unwarranted.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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